147 U.S. 413

RECORD, CASE No. 13,654.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 101.

MARCELLA DOYLE, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED SEPTEMBER 25, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 14, 1892.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 7th day of January, A. D. 1886, came Marcella Doyle, by A. H. De France, Esq., her attorney, and filed in said court her complaint and sued out of said court a writ of summons against the Union Pacific Railway Company; and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF NORTH AMERICA, *State of Colorado*, } ss:

In the Circuit Court of the United States for the District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff complains and alleges:

I.

2 That at the times hereinafter mentioned defendant was a corporation duly organized under the laws of the United States and was in possession of and operating a certain railroad in the State of Colorado known as the Denver, South Park and Pacific railroad, together with its tracks, cars, locomotives, section-houses, and other appurtenances thereto belonging.

That before the happening of the matters and things hereinafter stated the said defendant company had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employees working in said locality and passing through the same in the course of their employment; that the said building was of a fragile structure and in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such weight or size.

II.

That on or about the fifth day of November, A. D. 1883, at the instance and request of the defendant and for the mutual benefit of herself and defendant, the plaintiff, then and now a widow lady, undertook and agreed with defendant to occupy and keep for it, during its will and pleasure, its said section-house situated on the line of said railroad at or near Woodstock, in the county of Chaffee and State of Colorado, as aforesaid, and to furnish board thereat

for such section hands and other employees and servants of defendant as it should desire, at and for the rate and price of four and one-half dollars per week, to be paid by the persons so to be furnished by her with such board; and it was also understood as a part of said agreement that the defendant should aid and assist the plaintiff in collecting her pay for such board by stop-
3 ping and retaining the same for her out of and from the wages of those of its servants and employees who should be so furnished with board by her; that thereupon and on, to wit, the day and year last aforesaid, the plaintiff moved into said section-house with her family and immediately entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snow-slide hereinafter mentioned.

III.

That said section-house was situated near the foot or base of large mountains surrounding the same, in a mountainous country and in a locality where during the winter season of each year snow usually fell in great quantities and to great depths, and where dangerous snow-slides had occurred and were liable to occur, and where a snow-slide did occur, during the spring or winter next preceding said month of November, 1883, whereby and by reason of the premises the said section-house was an unsafe and dangerous place to live in during the winter and spring time of each year; of all which facts and of said danger the defendant had knowledge and was well aware at and before the time the plaintiff so moved into and undertook to keep said section-house as aforesaid; but, disregarding its duty in this respect, the defendant failed and neglected to notify or inform the plaintiff of said danger or of the occurrence of such snow-slide the winter or spring preceding, but wilfully withheld all notice or information thereof from her during the whole time she kept said section-house; that the plaintiff was at the time she so undertook to keep and moved into said section-house as afore-
said, and so remained during the whole time she kept and oc-
4 cupied said house, wholly ignorant of said danger and of the occurrence of such previous snow-slide, and was not aware that snow-slides were liable to occur at said place or at any place or at any time; that the defendant also failed and neglected to provide a suitable break or barrier to protect said house and the plaintiff from said danger, but carelessly left the same and her unprotected against said danger during the whole time she remained there.

III.

That on or about the tenth day of March, A. D. 1884, the snow, having previously fallen in great quantities and to a great depth around and about said section-house and on the mountains and mountain sides above and surrounding said house, broke loose and slid down very suddenly and without warning against and upon said house, crushing and breaking in the roof and other parts thereof

and completely burying the plaintiff, then in said house, and all the other inmates thereof, underneath said slide, where she, the plaintiff, was compelled to remain for a long space of time, to wit, for the space of five hours, and thereby suffered great pain both in body and mind, and was thereby greatly and severely bruised, crushed, and otherwise injured, and was, as she believes, permanently injured thereby; that she was thereby so hurt and injured that she became sore, sick, and lame, and hath continued so from thence hitherto, and was thereby compelled to expend for medicine, medical advice and attendance, and for nursing, the sum of two hundred and fifty dollars; and that thereby all the household and kitchen furniture of the plaintiff then in said house, consisting of stoves, tables, dishes, chairs, bedsteads, beds, and bedding, lounges, stools, buckets, trunks, carpets, etc., and also provisions then on hand, and coal and coal oil, matches, tobacco, and other things, together with her wearing apparel and the wearing apparel of her children, all of the value of five hundred dollars, were so damaged that the same were rendered wholly worthless and were entirely lost to the plaintiff—

Whereby and by reason of the wrongful and fraudulent acts, negligence, and defaults of the defendant in not notifying the plaintiff of said danger and in wilfully withholding notice and information thereof from the plaintiff, in building said section-house at said place and in keeping the same there, and in not providing or constructing a suitable break or barrier to protect said house and the plaintiff from said danger, and without any fault or negligence of the plaintiff, she, the plaintiff, was injured, put to great expense, and lost her property as aforesaid, and thereby has sustained great damages, to wit, damages in the sum of twenty thousand dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of twenty thousand dollars and for costs of suit.

(Signed) A. H. DE FRANCE AND
" PATTERSON & THOMAS,
Attorneys for Plaintiff.

(Endorsed:) No. 1882. U. S. circuit court, district of Colorado. Marcella Doyls *vs.* The Union Pacific Railway Company. Complaint. Filed Jan. 7, 1886. (Signed) Edward F. Bishop, clerk. A. H. De France and Patterson & Thomas, attorneys.

And the said summons is in the words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

MARCELLA DOYLE, Plaintiff,
versus
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Complaint filed in the clerk's office this seventh day of January, A. D. 1886.

The President of the United States of America to the Union Pacific Railway Company, Greeting:

You are hereby notified that an action has been brought in said court by Marcella Doyle, plaintiff, against you, as defendant, to recover the sum of $20,000.00, damages sustained by plaintiff by reason of a snow-slide partly destroying a certain section-house on the 10th day of March, 1884, erected by plaintiff on the line of its road at Woodstock, in said district, said house being occupied by plaintiff, as more fully set forth and described in the complaint filed herein and to which reference is here made, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days
7 (exclusive of the day of service) after the summons shall be served on you, if such service shall be made with- the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default according to the prayer of the said complaint and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this seventh day of January, A. D. 1886, and of the Independence of the United States the 110th year.

[Seal Cir. C't U. S., Dist. of Colo.]

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

DENVER, *Jan'y —, A. D.* 1886.

I hereby certify that I received the within writ on the 7th day of January, A. D. 1886, and that I have personally served the same upon the said defendant, The Union Pacific Railway Company, by

delivering to J. K. Choate, superintendent of defendant company for Colorado division, personally a true copy of the within writ, at Denver, county of Arapahoe, on the 13th day of January, A. D. 1886; no president, vice-president, secretary, treasurer, general manager, or other officer of said defendant company found in my district.

8 This writ therefore returned executed as the law directs this — day of January, A. D. 1886.

(Signed) WALTER A. SMITH, *Marshal.*
" E. F. DEAN, *Deputy Marshal.*

(Endorsed:) Gen. No., 1882. Circuit court of the United States for the district of Colorado. Marcella Doyle, plaintiff, *versus* The Union Pacific R'y Co., defendant. Summons. Filed this 14th day of Jan'y, A. D. 1886. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. A. H. De France, of Golden, Patterson & Thomas, of Denver, attorney for plaintiff.

And afterwards and on, to wit, the 1st day of February, A. D. 1886, came the said defendant, by Teller and Orahood, Esqrs., its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein.

And the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States, District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Answer.

Now comes the defendant in the above-entitled action, and

9 for answer to plaintiff's complaint herein denies that defendant at any time caused to be constructed at a station called Woodstock a certain one-story frame building called a section-house, intended to be used by said company for boarding or lodging of its employés, as in said complaint stated, or otherwise; denies that said building was of fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such size or weight.

Defendant denies that at the time mentioned in said complaint or at any other time, at the instance and request of defendant or for the mutual benefit of plaintiff and defendant or otherwise, the plaintiff undertook or agreed with defendant to occupy or keep for it during the will and pleasure of defendant or otherwise said section-house; denies that at the time mentioned plaintiff was a widow lady, and denies that she was to furnish board at said section-house for the section hands or other employés or servants of the defendant at any rate or price whatever, but admits that if she was to furnish board to any person or persons whomsoever the same was to be paid for by the person or persons so to be furnished with such board; denies that it was understood as a part of said agree-

ment that defendant should aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family or entered upon the discharge of her duties as keeper thereof or remained in the discharge of such duties, as in said complaint stated.

Defendant denies that said section-house was situated near the foot or base of large mountains surrounding the same, in a
10 mountainous country, or in a locality where during the winter season of each year snow usually fell in great quantities or to great depths, or where dangeroue snow-slides had occurred or were liable to occur, or where the same had occurred during the spring or winter next preceding the month of November, 1883; denies that by any reason whatever said section-house was an unsafe or a dangerous place to live in during the winter or spring of each year, and denies that all or any of the facts so stated in said complaint were known to defendant, or that it had any knowledge or was aware of the same at any time whatever; denies that the defendant disregarded its duty in any respect toward plaintiff, and denies that defendant failed or neglected to notify or inform plaintiff of said danger or of the occurrence of snow-slides, as in said complaint stated, and denies that defendant willfully or otherwise withheld notice or information thereof from plaintiff at or during any time whatever. Defendant denies that plaintiff was or remained during any time whatever ignorant of said danger or of the occurrence of previous snow-slides, and denies that she was not aware that snow-slides were liable to occur at said place, as in said complaint stated; denies that defendant failed or neglected to provide a suitable break or barrier to protect said house and the plaintiff from said danger; denies that defendant carelessly or otherwise left the same and plaintiff unprotected against said danger at any time, as in said complaint stated.

Defendant denies that at the time mentioned in said complaint or at any other time the snow had fallen in great quantities or to a great depth around or about said section-house or on the mountain sides above and surrounding the same, and denies that the said snow broke loose or slid down suddenly or without warning
11 against or upon said house or crushed or broke in the roof or other parts thereof or completely buried the plaintiff in said house or underneath said house or underneath said slide, and denies that plaintiff was compelled there to remain for a long space of time, as in said complaint stated, or otherwise; denies that plaintiff suffered great paid of body or mind or was greatly or severely bruised, crushed, or injured or was permanently injured thereby; denies that she has become sore, sick, or lame or has been compelled to expend any sum or amount whatever for medicine, medical advice, or attendance or nursing, and denies that all or any part of the household or kitchi*n*g furniture of plaintiff or other personal property mentioned by plaintiff in her said complaint, of any value whatever, were damaged or rendered worthless or were lost to plaintiff.

Defendant denies that by reason of any wrongful or fraudulent

acts or any negligence on the part of defendant, as in said complaint stated or otherwise, the plaintiff was injured or put to any expense or lost any property or has sustained any damage in any sum or amount whatever, as in said complaint stated or otherwise; denies that any injury or damage suffered by plaintiff was without any fault or negligence on her part, and denies that plaintiff was injured by, through, or on account of any act, default, or neglect of defendant in any way or manner whatever.

Defendant, further answering, alleges that the manner of the construction of said section-house and the locality thereof and the formation of the mountains surrounding the same and the liability to snow-storms and accumulation of snow thereon and the liability of snow-slides occurring in the vicinity of said house, and that
12 the same might be struck, injured, and demolished thereby and the inmates thereof injured, and all the surrounding circumstances and facts connected therewith were, at all times mentioned in said complaint, fully known to said plaintiff, and defendant alleges that plaintiff, knowing all of said facts and circumstances, voluntarily entered into said section-house and lived in and kept the same and transacted business therein of her own free will and accord, knowing all the dangers thereof, without any inducement whatever on behalf of defendant, and that the said plaintiff had full and complete means of knowledge in regard to all of said facts at and during all the time and times mentioned in said complaint. Wherefore defendant alleges that whatever injury or damages plaintiff may have suffered was caused by and through and on account of her own acts and not by, through, and on account of act, default, or negligence of defendant.

Wherefore defendant prays judgment to be dismissed and to recover its costs in this behalf expended.

(Signed) TELLER & ORAHOOD,
Attorneys for Defendant.

(Endorsed:) No. 1882. U. S. C. court, district of Colorado. Marcella Doyle *vs.* U. P. R'y Co. Answer. Filed Feb. 1, 1886. (Signed) Edward F. Bishop, clerk. Teller & Orahood, att'ys for def't.

And afterwards and on, to wit, the 17th day of February, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was
13 had and entered of record in said court and in said cause, to wit:

Order: Trial.

MARCELLA DOYLE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1882. Action for Damages.

At this day comes the said plaintiff, by A. H. De France, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

Summons.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States for the District of Colorado.

MARCELLA DOYLE, Plaintiff,
versus
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Complaint filed in the clerk's office this seventh day of January, A. D. 1886.

The President of the United States of America to the Union Pacific Railway Company, Greeting:

You are hereby notified that an action has been brought in said court by Marcella Doyle, plaintiff, against you, as defendant, to recover the sum of $20,000.00, damages sustained by plaintiff by reason of a snow-slide partly destroying a certain section-house on the 10th day of March, 1884, erected by plaintiff on the line of its road at Woodstock, in said district, said house being occupied by plaintiff, as more fully set forth and described in the complaint filed herein and to which reference is here made, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days
7 (exclusive of the day of service) after the summons shall be served on you, if such service shall be made with- the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default according to the prayer of the said complaint and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this seventh day of January, A. D. 1886, and of the Independence of the United States the 110th year.

[Seal Cir. C't U. S., Dist. of Colo.]

(Signed) EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

DENVER, *Jan'y —, A. D.* 1886.

I hereby certify that I received the within writ on the 7th day of January, A. D. 1886, and that I have personally served the same upon the said defendant, The Union Pacific Railway Company, by

delivering to J. K. Choate, superintendent of defendant company for Colorado division, personally a true copy of the within writ, at Denver, county of Arapahoe, on the 13th day of January, A. D. 1886; no president, vice-president, secretary, treasurer, general manager, or other officer of said defendant company found in my district.

8 This writ therefore returned executed as the law directs this — day of January, A. D. 1886.

(Signed) WALTER A. SMITH, *Marshal.*
" E. F. DEAN, *Deputy Marshal.*

(Endorsed:) Gen. No., 1882. Circuit court of the United States for the district of Colorado. Marcella Doyle, plaintiff, *versus* The Union Pacific R'y Co., defendant. Summons. Filed this 14th day of Jan'y, A. D. 1886. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. A. H. De France, of Golden, Patterson & Thomas, of Denver, attorney for plaintiff.

And afterwards and on, to wit, the 1st day of February, A. D. 1886, came the said defendant, by Teller and Orahood, Esqrs., its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein.

And the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States, District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Answer.

Now comes the defendant in the above-entitled action, and

9 for answer to plaintiff's complaint herein denies that defendant at any time caused to be constructed at a station called Woodstock a certain one-story frame building called a section-house, intended to be used by said company for boarding or lodging of its employés, as in said complaint stated, or otherwise; denies that said building was of fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such size or weight.

Defendant denies that at the time mentioned in said complaint or at any other time, at the instance and request of defendant or for the mutual benefit of plaintiff and defendant or otherwise, the plaintiff undertook or agreed with defendant to occupy or keep for it during the will and pleasure of defendant or otherwise said section-house; denies that at the time mentioned plaintiff was a widow lady, and denies that she was to furnish board at said section-house for the section hands or other employés or servants of the defendant at any rate or price whatever, but admits that if she was to furnish board to any person or persons whomsoever the same was to be paid for by the person or persons so to be furnished with such board; denies that it was understood as a part of said agree-

ment that defendant should aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family or entered upon the discharge of her duties as keeper thereof or remained in the discharge of such duties, as in said complaint stated.

Defendant denies that said section-house was situated near the foot or base of large mountains surrounding the same, in a
10 mountainous country, or in a locality where during the winter season of each year snow usually fell in great quantities or to great depths, or where dangeroue snow-slides had occurred or were liable to occur, or where the same had occurred during the spring or winter next preceding the month of November, 1883; denies that by any reason whatever said section-house was an unsafe or a dangerous place to live in during the winter or spring of each year, and denies that all or any of the facts so stated in said complaint were known to defendant, or that it had any knowledge or was aware of the same at any time whatever; denies that the defendant disregarded its duty in any respect toward plaintiff, and denies that defendant failed or neglected to notify or inform plaintiff of said danger or of the occurrence of snow-slides, as in said complaint stated, and denies that defendant willfully or otherwise withheld notice or information thereof from plaintiff at or during any time whatever. Defendant denies that plaintiff was or remained during any time whatever ignorant of said danger or of the occurrence of previous snow-slides, and denies that she was not aware that snow-slides were liable to occur at said place, as in said complaint stated; denies that defendant failed or neglected to provide a suitable break or barrier to protect said house and the plaintiff from said danger; denies that defendant carelessly or otherwise left the same and plaintiff unprotected against said danger at any time, as in said complaint stated.

Defendant denies that at the time mentioned in said complaint or at any other time the snow had fallen in great quantities or to a great depth around or about said section-house or on the mountain sides above and surrounding the same, and denies that the said snow broke loose or slid down suddenly or without warning
11 against or upon said house or crushed or broke in the roof or other parts thereof or completely buried the plaintiff in said house or underneath said house or underneath said slide, and denies that plaintiff was compelled there to remain for a long space of time, as in said complaint stated, or otherwise; denies that plaintiff suffered great paid of body or mind or was greatly or severely bruised, crushed, or injured or was permanently injured thereby; denies that she has become sore, sick, or lame or has been compelled to expend any sum or amount whatever for medicine, medical advice, or attendance or nursing, and denies that all or any part of the household or kitchi*n*g furniture of plaintiff or other personal property mentioned by plaintiff in her said complaint, of any value whatever, were damaged or rendered worthless or were lost to plaintiff.

Defendant denies that by reason of any wrongful or fraudulent

acts or any negligence on the part of defendant, as in said complaint stated or otherwise, the plaintiff was injured or put to any expense or lost any property or has sustained any damage in any sum or amount whatever, as in said complaint stated or otherwise; denies that any injury or damage suffered by plaintiff was without any fault or negligence on her part, and denies that plaintiff was injured by, through, or on account of any act, default, or neglect of defendant in any way or manner whatever.

Defendant, further answering, alleges that the manner of the construction of said section-house and the locality thereof and the formation of the mountains surrounding the same and the liability to snow-storms and accumulation of snow thereon and the liability of snow-slides occurring in the vicinity of said house, and that
12 the same might be struck, injured, and demolished thereby and the inmates thereof injured, and all the surrounding circumstances and facts connected therewith were, at all times mentioned in said complaint, fully known to said plaintiff, and defendant alleges that plaintiff, knowing all of said facts and circumstances, voluntarily entered into said section-house and lived in and kept the same and transacted business therein of her own free will and accord, knowing all the dangers thereof, without any inducement whatever on behalf of defendant, and that the said plaintiff had full and complete means of knowledge in regard to all of said facts at and during all the time and times mentioned in said complaint. Wherefore defendant alleges that whatever injury or damages plaintiff may have suffered was caused by and through and on account of her own acts and not by, through, and on account of act, default, or negligence of defendant.

Wherefore defendant prays judgment to be dismissed and to recover its costs in this behalf expended.

(Signed) TELLER & ORAHOOD,
Attorneys for Defendant.

(Endorsed:) No. 1882. U. S. C. court, district of Colorado. Marcella Doyle *vs.* U. P. R'y Co. Answer. Filed Feb. 1, 1886. (Signed) Edward F. Bishop, clerk. Teller & Orahood, att'ys for def't.

And afterwards and on, to wit, the 17th day of February, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was
13 had and entered of record in said court and in said cause, to wit:

Order: Trial.

MARCELLA DOYLE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1882. Action for Damages.

At this day comes the said plaintiff, by A. H. De France, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And thereupon comes a jury, to wit, William M. Bond, Taylor Green, B. L. James, Maurice Wolf, Thomas Crisman, A. M. Baker, John S. Henrich, William Martin, W. R. Blove, Samuel B. Wright, John W. Knox, Daniel McGonigal, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

14 And afterwards and on, to wit, the 18th day of February, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Continued.

MARCELLA DOYLE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1882. Action for Damages.

At this day come again the said parties, by their attorneys, respectively.

And the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 19th day of February, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Concluded. Verdict.

15 MARCELLA DOYLE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1882. Action for Damages.

At this day comes again the said parties, by their attorneys, respectively.

And the jurors heretofore impaneled and sworn in this cause being now all here present and in the jury-box, the trial of the issues herein joined is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on the same day come again the said jurors and on their oaths do say they find for the defendant.

And afterwards and on, to wit, the 5th day of March, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Denied. Time for Bill of Exceptions.

MARCELLA DOYLE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1882. Action for Damages.

At this day comes the said plaintiff, by T. M. Patterson, Esq., her attorney, and the said defendant, by Willard Teller,
16 Esq., its attorney, also comes.

And the motion of the said plaintiff for a new trial of the issues herein joined having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore, on motion of the said defendant, it is considered by the court that the said defendant go hence hereof without day and have and recover of and from the said plaintiff its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And, on her motion, day until thirty (30) days from this day is allowed the said plaintiff to file herein her bill of the exceptions reserved by her upon the trial of the issues herein joined.

And afterwards and on, to wit, the 4th day of April, A. D. 1887, came again the said plaintiff, by her attorney aforesaid, and filed in said court and in said cause her bill of the exceptions reserved by her upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

17 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States for the District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that on the trial of this cause, at the November term, A. D. 1886, of the said circuit court, the defendant admitted, and such admissions were received in evidence before the jury—

"That the said section-house hereinafter mentioned was built and used by the defendant as and for a section-house and a place at which the section hands of the defendant who should work on said section could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with the defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of its railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section-house for such section hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so furnished with such board, but the defendant was to aid and

18 assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board; that plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section-house with her family and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snow-slide, on the 10th of March, A. D. 1884; that the defendant did not at any time notify or apprise the plaintiff or cause her to be notified or apprised of the danger of a snow-slide or snow-slides or of the liability of a snow-slide or snow-slides at such place where said section-house then was or in that locality. And the plaintiff, further to maintain the issues on her part, introduced evidence tending to show that said section-house was a one-story frame building and was constructed in 1882, about the time that said railroad was first operated in that section of the country; was situated in the mountains, near the base of a high and steep mountain and in a place subject to snow-slides and dangerous on that account; that the sides of the mountain at the base of which was the house in question were marked by the tracks of former snow-slides, but only those familiar with snow-slides and their effects would know what they meant; that the defendant was aware of said danger at and

before the time it engaged the plaintiff to keep its said section-house; that the plaintiff and her said children had never before resided in a region of country subject to snow-slides and had no knowledge of snow-slides or of their indications or of the dangers incident thereto and was not aware of the particular danger in question; that there was a prominence or hip on this mountain side, about ten or twelve hundred feet above the section-house, which cut off a view of the mountain side above said hip from the section-house or its immediate vicinity; that above said hip there was a large depression or draw on the mountain side extending from said hip to the summit, into which great quantities of snow fell and drifted during the winter season of each year, thus tending to create snow-slides of danger to persons in said section-house or its vicinity; that this danger was not apparent even to a person having knowledge of snow-slides and their causes without a view or examination of this mountain side above said hip; that the altitude of said section-house was about 10,200 feet, and of the summit of said mountain nearly 12,000 feet; that the snow-fall there was great in the winter season of each year, and that depressions on the mountain side were filled with snow by drifting; that the snow-slide of March 10th, 1884, which injured the plaintiff, proceeded from this depression above said hip; that a snow-slide of less dimensions and of less scope and extent occurred there in February, 1883, in the same place and from the same source, which reached to within about two hundred feet of said section-house and of which the defendant had knowledge at the time thereof.

That the attention of the superintendent of the construction of said railroad and of said section-house was called to the fact of such danger, at or about the time said section-house was built, by one of the civil engineers of said defendant who assisted in locating the line of said railroad.

That the plaintiff was in said section-house at the time the said snow-slide of March 10th, 1884, occurred.

That through this prominence or hip on the mountain side there was a chasm or draw from twenty to thirty feet wide, which continued on down to the section-house, but became wider after leaving the hip; that with this draw another draw united about midway between the section-house and the said hip and formed one draw from their point of union to the section-house.

That this mountain is a part of the range of mountains known as the Continental Divide, which divides the waters of the Atlantic from those of the Pacific. At this point above Woodstock station the course of the mountain is nearly east and west. This railroad passes this mountain by means of a tunnel called "Alpine tunnel," which is to the westward of a line north from Woodstock and descends this mountain at a heavy grade, along the side thereof about midway between the section-house and the said hip on the mountain (which hip is termed a projection of rocks by some of the witnesses), and passes on to the eastward of Woodstock a con-

siderable distance, where it turns and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section-house and said hip—the section-house being below and distant from this lower track about two hundred and thirty feet—and the two tracks forming this horseshoe are both between the section-house and said hip and on a direct line from the section-house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy feet higher in point of altitude where they cross this line from the section-house to the hip on the mountain side above; that there was a water-tank on the upper side of the lower track fifty or sixty feet to the westward of the section-house, which water-tank was injured by the snow-slide of February, 1883.

That the snow-slide of March 10th, 1884, spread out as it descended the mountain, so that where it passed over the
21 lower railroad track its space in width was six or seven hundred feet, and the section-house was not far from the center of said snow-slide track.

That the contour of this mountain, beginning at the section-house and ascending the mountain, is about as follows, to wit: Above the section-house it slopes slowly to the first railroad track; then there is a rock-slide; then there is a bench above that and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a space from three to four hundred feet in width of nothing but rock, with a very steep slope, and above this slope some very steep rocks (the hip on the mountain side), and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet long to the summit of the mountain, which has an elevation or altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope of more than thirty-three degrees, and from the hip down there is quite a precipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber and in and about the section-house there is a space of eight or nine hundred feet square on which there is no timber except three or four trees.

That the timber on the mountain side was sparse and scattered; that only a few trees were carried down by the snow-slide; that snow-slides do not always follow beaten tracks made by former snow-slides on the same mountain side, but frequently depart therefrom; that the snow-slide of March 10th, 1884,
22 separated into broken fragments or divisions before reaching the base of the mountain, one of which struck the section-house, resulting in the injuries complained of.

That the winter of 1883–'4 was severer and the snow fell some deeper than the winter previous thereto, and that it snowed heavily and continuously from about the 1st of March to the 10th of March, 1884, and the trains had ceased to run on account of the snow; that

ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift and after it had settled compactly; that it drifted greatly, filling up basins and depressions on the mountain sides; that there were rock-slides and existing evidences of former snow-slides on this mountain side above said section-house.

That the snow-slide of February, 1883, deposited snow and débris on the upper track of the railroad above said section-house from twenty to twenty-five feet deep, and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

That by and by reason of said snow-slide the plaintiff sustained serious and permanent injuries to her person and was put to expense on account thereof and also lost some valuable property.

And the defendant, to maintain the issues on its part, introduced evidence tending to prove that said section-house was built below the said tracks and behind, and protected by a thick growth of timber above and between said section-house and the mountain; that there were no marks or tracks of former snow-slides directly above or in the vicinity of said section-house; that the defendant was not aware of any danger from snow-slides at
23 the place where the section-house was built, but, on the contrary, that the officers of the company had carefully examined the locality where the same was built and the contour of the mountains above the same to the summit of the range, and that said section-house was built at that place because the officers of the company thought that it was a safe place and could not be endangered by snow-slides, which were apt to occur in that part of the country; that the prominence or hip spoken of was a protection against snow-slides which might occur on the mountain sides above said section-house; that an examination of the ground, timber, and rocks in the vicinity of where the house was built and above, on the mountain side, showed that there had not been a snow-slide there for at least two hundred years; that the snow-slide of March 10th, 1884, was caused by a storm of unprecedented severity and duration, and that the same came down through the timber above said house, breaking down and carrying with it standing trees, from bushes up to trees two feet in diameter; that the snow-slide mentioned as occurring in February, 1883, came down a considerable distance to the north of where the one came down in 1884, and that the snow-slide in 1883 did no damage except to cover up a short distance of the railroad track and break in some boards of the house under the water-tank; that the attention of the superintendent of construction of said railroad was not called by any one to the fact of there being any danger from snow-slides at the place where said section-house was built, but that the conversation or notice referred to was in regard to a place a mile or more farther up Quartz creek; that the said Andrew Doyle had been an employé of the defendant as a section hand, but had quit work some days before on account of the

road being blockaded by snow and all attempts to open it
24 having been abandoned, and for ten days or more before the
snow-slide no work whatever was being done by defendant on said road for a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section-house and its immediate locality from snow-slides; that there was no chasm or draw immediately above said section-house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section-house; that said section-house was broken down by said snow-slide of March 10, 1884, by a spreading out of the snow as it came down the mountain, and that said section-house was on the southerly side of said snow-slide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the hip or prominence; that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable amount of timber between said section-house and the first railroad track and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rock-slides or existing evidences of former snow-slides on the mountain sides immediately above said section-house.

And the foregoing was all the evidence in the case.

And thereupon the plaintiff moved the court to charge the jury as follows:

If the jury believe from the evidence that the section-house in question was in a place of danger from snow-slides, and that the defendant was aware of said danger at the time it engaged
25 the plaintiff to keep its said section-house, then the defendant should have notified the plaintiff of said danger; and if you further find from the evidence that the defendant did not notify or apprise the plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff.

But the court refused to give to the jury the above and foregoing instruction; to which refusal of the court plaintiff, by her counsel, then and there excepted.

And thereupon the court charged the jury as follows:

It is a rule of law, gentlemen, that whenever an injury comes to any one through the wrongful act or negligence of another, that the person so injured may have a right of action to recover damages for the injury so sustained, and the statute enacts a rule which did not obtain prior to the statute, that "if death result from the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would if death had not ensued entitle the party injured to maintain an action to recover damages in respect thereof, then and in every such case the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the

death of the party injured." And in another section it is provided by whom the action may be maintained as the survivor whenever death is caused in the manner specified in this section.

In this instance the plaintiff has brought two actions—one in her own right for the injury which she herself sustained in consequence of the snow-slide at this place in the month of March, 1884, and
26 one for injuries resulting to her from the death of her children.

The first is founded upon the general principal which I have mentioned and the second upon this statute. The situation of the parties in respect to the controversy does not arise out of the application of any principals peculiarly applicable to railroads, and the circumstance that the defendant is a railroad company in this instance does not call for the application of any of the rules which are usually applied in cases of accident upon railroads.

And thereupon the court did further charge the jury as follows:

The railroad company, it would seem, had provided this section-house, and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the man and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies, who erect a boarding-house near their mines and there employ somebody to keep it. The use of the house may be given without rent, and the company may undertake to collect the money from the workmen in the mine, just as the railroad company did in this case, and it might occur in a hundred instances—probably does occur in very many—as in factories, where the conveniences of living are not sufficient in and about the works, the company or individuals carrying on the work may keep a house of this kind and rent it to any one who shall board their men, or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant.

To the giving of which instruction the plaintiff, by her
27 counsel, then and there excepted.

And the court further charged the jury as follows:

The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principals applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant has occupied such a house having contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it is given, but I believe I have seen it—in which a house was imme-

road being blockaded by snow and all attempts to open it
24 having been abandoned, and for ten days or more before the
snow-slide no work whatever was being done by defendant on said road for a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section-house and its immediate locality from snow-slides; that there was no chasm or draw immediately above said section-house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section-house; that said section-house was broken down by said snow-slide of March 10, 1884, by a spreading out of the snow as it came down the mountain, and that said section-house was on the southerly side of said snow-slide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the hip or prominence; that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable amount of timber between said section-house and the first railroad track and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rock-slides or existing evidences of former snow-slides on the mountain sides immediately above said section-house.

And the foregoing was all the evidence in the case.

And thereupon the plaintiff moved the court to charge the jury as follows:

If the jury believe from the evidence that the section-house in question was in a place of danger from snow-slides, and that the defendant was aware of said danger at the time it engaged
25 the plaintiff to keep its said section-house, then the defendant should have notified the plaintiff of said danger; and if you further find from the evidence that the defendant did not notify or apprise the plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff.

But the court refused to give to the jury the above and foregoing instruction; to which refusal of the court plaintiff, by her counsel, then and there excepted.

And thereupon the court charged the jury as follows:

It is a rule of law, gentlemen, that whenever an injury comes to any one through the wrongful act or negligence of another, that the person so injured may have a right of action to recover damages for the injury so sustained, and the statute enacts a rule which did not obtain prior to the statute, that "if death result from the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would if death had not ensued entitle the party injured to maintain an action to recover damages in respect thereof, then and in every such case the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the

death of the party injured." And in another section it is provided by whom the action may be maintained as the survivor whenever death is caused in the manner specified in this section.

In this instance the plaintiff has brought two actions—one in her own right for the injury which she herself sustained in consequence of the snow-slide at this place in the month of March, 1884, and
26 one for injuries resulting to her from the death of her children.

The first is founded upon the general principal which I have mentioned and the second upon this statute. The situation of the parties in respect to the controversy does not arise out of the application of any principals peculiarly applicable to railroads, and the circumstance that the defendant is a railroad company in this instance does not call for the application of any of the rules which are usually applied in cases of accident upon railroads.

And thereupon the court did further charge the jury as follows:

The railroad company, it would seem, had provided this section-house, and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the man and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies, who erect a boarding-house near their mines and there employ somebody to keep it. The use of the house may be given without rent, and the company may undertake to collect the money from the workmen in the mine, just as the railroad company did in this case, and it might occur in a hundred instances—probably does occur in very many—as in factories, where the conveniences of living are not sufficient in and about the works, the company or individuals carrying on the work may keep a house of this kind and rent it to any one who shall board their men, or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant.

To the giving of which instruction the plaintiff, by her
27 counsel, then and there excepted.

And the court further charged the jury as follows:

The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principals applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant has occupied such a house having contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it is given, but I believe I have seen it—in which a house was imme-

diately above an excavation which had been made below for a mine, and a caving occurred and the house fell into the excavation, the tenant going there without knowledge of the defect existing underground, if the landlord had knowledge and concealed the fact from him he may be liable to an action in respect to a matter of that kind. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant and not otherwise unless there is some wrong-doing—some omission of duty—on the part of the landlord towards his tenant. There is no right of action, and if the defect be one which is as apparent to the tenant as to the
28 landlord, open to the observation of all, then there is no right of action.

And to the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

Now, to apply this rule to cases of this kind there can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built—as the scheme itself was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were under only one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter.

And to the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

They are not responsible for the condition of the country as that it was subject to snow-slides. They were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides. They could do these things without liability to any one if they were done in a careful and prudent manner, just as a man who goes upon the mountain side to mine; he may be in a very dangerous locality, he may be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter; in going to such place, if he uses such care as he can, if he selects what appears to him
29 to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there.

And to the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road if they thought proper to do so. If a section-house was needed there all

that was required of them was to put it in the place which seemed to be best, which in the exercise of ordinary care and prudence seemed to be the best suited for the work.

To the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be best, which in the exercise of ordinary care and prudence seemed to be the best suited for the work.

To which instruction of the court the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

Now, the question is whether this was done or whether there was anything in the circumstances which, if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been, in being there at the time of this snow-slide.

To which instruction of the court the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black cañon of the Gunnison river a rock-slide came down the mountain side and it was very near coming on the train which was passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of the company for that. It was one of the dangers of the country in which their road was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character.

To the giving of which instruction by the court plaintiff, by her counsel, then and there excepted.

And the court further instructed the jury as follows:

If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended whether he would be responsible to a tenant who should go into the house to locate in it in such a place.

And to the giving of which instruction by the court the plaintiff, by her counsel, then and there excepted.

And the court further instructed the jury as follows:

Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to be submitted to the jury at all; but I have decided for the present at least to submit it to your judgment, since it may be more desirable that it should be determined by business men than by any officer of the court; so it is submitted for your consideration with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use.

And to the giving of which instruction by the court plaintiff, by her counsel, then and there excepted; each of the exceptions hereinbefore mentioned was taken while the jury was at the bar and before they retired to consider of their verdict.

And the court further instructed the jury as follows:

32 If you find against the company, then the question will be as to the measure of damages. As to that I have very little to say to you. In the action which the plaintiff herself has brought, which she herself has sustained, she has testified before you as to the nature and extent of the injury. It has disabled her to some extent, unquestionably, and she has lost some property. What may be your estimate of those things I cannot assume to say, and as to the others, the children, of course, that is a matter which rests also in your judgment. They were, all of them, people who could work, and the estimate of the law is what she might receive from them in case their lives were prolonged in the way of support and maintenance as she would go on in life. They were working people, and, of course, the estimate, whatever it is, must be according to their capacity to earn money.

And the foregoing were all the instructions given by the court to the jury in the case.

And thereupon the jury retired to consider of their verdict, and, having considered of their verdict, they returned into court and returned a verdict in favor of defendant.

Thereafter and upon the 2nd day of March, 1887, the plaintiff filed her motion for a new trial in said causes; which motion is as follows, to wit:

UNITED STATES OF AMERICA, } ss:
State of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

33 MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

And now comes the plaintiff, by A. H. De France and Patterson & Thomas, her attorneys, and moves the court to set aside the verdict of the jury and to grant the plaintiff a new trial herein for the following reasons, to wit:

1. That the verdict is contrary to the evidence.
2. That the verdict is against the weight of the evidence.
3. That the verdict is contrary to law.
4. That the court erred in rejecting proper evidence offered by plaintiff.
5. That the court erred in admitting improper evidence offered by defendant.
6. That the court erred in refusing the instruction asked by plaintiff.
7. That the court erred in its instructions to the jury.
8. That the court erred in its charge to the jury in the following parts and each thereof of said charge, lettered from "A" to "J," inclusive:

(A.) The railroad company, it would seem, had provided this section-house and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies who erect a boarding-house near their mines and there employ somebody to keep it. The use of the house may
34 be given without rent and the company may undertake to collect the money from the workmen in the mine just as the railroad company did in this case, and it might occur in a hundred instances, probably does occur in very many, as in factories where the conveniences of living are not sufficient in and about the works; the company or individuals may keep a house of this kind and rent it to any one who shall board their men or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant.

(B.) The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render service there which stood in lieu of rent between the parties, and the principles applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior

tenant has occupied such a house having a contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage result to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant and not otherwise. Unless there is some wrong-doing, some omission of duty on the part of the landlord towards his tenant, there is no right of action; and if the defect be one which is as apparent to the tenant as to the landlord—open to the observation of all—then there is no right of action.

(C.) Now, to apply this rule to cases of this kind: There can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built, as the scheme was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were under only one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter.

(D.) They are not responsible for the condition of the country as that it was subject to snow-slides; they were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides; they could do these things without liability to any one, if they were done in a careful and prudent manner, just as a man who goes on a mountain side to mine; he may be in a very dangerous locality; he may be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter. In going to such place, if he uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there.

(E.) So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road, if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be best, which, in the exercise of ordinary care and prudence, seemed to be the best suited for the work.

(F.) Now, the question is whether this was done or whether there was anything in the circumstances which if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in

this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been in being there at the time of this snow-slide.

(G.) Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black cañon of the Gunnison river a rock-slide came down the mountain side and it was very near coming upon a train which was passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of the company for that. It was one of the dangers of the country in which their road was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character.

(H.) If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-
37 slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended, whether he would be responsible to a tenant who should go into the house for locating it in such a place.

(J.) Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section-house in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to be submitted to the jury at all; but I have decided for the present, at least, to submit it to your judgment, since it may be more desirable that it should be determined by business men than by an officer of the court; so it is submitted for your consideration, with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use.

(S'g'd) A. H. DE FRANCE,
PATTERSON & THOMAS,
Attorneys for Plaintiff.

38 But the court afterwards, to wit, on the 5th day of March, 1887, the same having been argued and submitted, over-

ruled said motion for a new trial; to which ruling of the court the plaintiff, by her counsel, then and there excepted; and thereupon the court rendered judgment on the verdict in favor of the defendant, to which the plaintiff then and there excepted.

And forasmuch as the matters and things herein set forth do not appear of record in said cause, the plaintiff tenders this her bill of exceptions to this honorable court, and prays that it may be signed and sealed by the court and made a part of the record in this cause, which is accordingly done this 4 day of April, A. D. 1887.

(Signed) MOSES HALLETT, [SEAL.]
Dist. Judge.

(Endorsed:) 1882. U. S. circuit court, district of Colorado. Marcella Doyle *vs.* The Union Pacific Railway Co. Bill of exceptions. Filed Apr. 4, 1887. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 19th day of February, A. D. 1889, came again the said plaintiff, by her attorney aforesaid, and filed in said court and in said cause her bond and sued out of said court a writ of error and citation to the Supreme Court of the United States.

And the said bond is in words and figures as follows, to wit:

39 *Bond.*

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, Marcella Doyle, as principal, and James M. Doyle, Thomas M. Patterson, and Allison H. De France, as sureties, are held and firmly bound unto the Union Pacific Railway Company in the full and just sum of one thousand dollars, to be paid to the said The Union Pacific Railway Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the November term, A. D. 1886, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Marcella Doyle, plaintiff, and The Union Pacific Railway Company, defendant, judgment was rendered against the said Marcella Doyle, and the said Marcella Doyle, plaintiff, having obtained a writ of error to reverse the judgment of said court, and a citation directed to the said The Union Pacific Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said Marcella Doyle, plaintiff, shall prosecute said writ to effect and

answer all damages and costs if she fails to make good her
40 plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed)	MARCELLA her x mark. DOYLE.	[SEAL.]
"	JAMES M. DOYLE.	[SEAL.]
"	THOMAS M. PATTERSON.	[SEAL.]
"	ALLISON H. DE FRANCE.	[SEAL.]

Witness- as to Marcella Doyle's mark:
(Signed) A. H. DE FRANCE.
" JAMES M. DOYLE.

Approved Feb'y 19, 1889.
(Signed) MOSES HALLETT, *Judge.*

(Endorsed:) Gen. No., 1882. Circuit court of the United States, district of Colorado. Marcella Doyle *vs.* The Union Pacific Railway Company. Bond on writ of error, $1,000.00. Filed this 19th day of Feb'y, A. D. 1889. (Signed) William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

Writ of Error.

41 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court between Marcella Doyle, plaintiff, and The Union Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said Marcella Doyle, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein

to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 113th year.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

41½ [Endorsed:] Gen. No., 1882. Circuit court of the United States for district of Colorado. Marcella Doyle, plaintiff in error, *vs.* The Union Pacific Railway Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 19th day of Feb'y, A. D. 18—. William A. Willard, clerk, by F. W. Tupper, deputy clerk. A. H. De France, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado*, } *ss*:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 2d day of August, A. D. 1889.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

42 And the said citation is next hereto attached, to wit:

Citation.

43 Citation, U. S. circuit court.

THE UNITED STATES OF AMERICA, *District of Colorado*. }

The United States of America to The Union Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States

for the district of Colorado, wherein Marcella Doyle is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 19th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

MOSES HALLETT, *Judge.*

44 [Endorsed:] Gen. No., 1882. Circuit court of the United States, district of Colorado. Marcella Doyle, plaintiff in error, *vs.* The Union Pacific Railway Company, defendant in error. Citation. Filed in circuit court of the U. S. this 21st day of Feb'y, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. A. H. De France, attorney for plaintiff in error.

Service of copy of the within citation on the Union Pacific Railway Co. this 20th day of Feb'y, 1889, is hereby admitted.

TELLER & ORAHOOD,
Att'ys for the U. P. R'y Co.

45 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered in said court and in a certain cause lately in said court pending, wherein Marcella Doyle was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this second day of August, A. D. 1889.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Assignment of Errors and Prayer for Reversal.

46 Supreme Court of the United States, of the October Term, in the Year of our Lord one Thousand Eight Hundred and Eighty-nine.

MARCELLA DOYLE, Plaintiff in Error,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Marcella Doyle, by Patterson & Thomas, her attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. The circuit court erred in refusing to give to the jury the following instruction asked by the plaintiff in error, to wit: "If the jury believe from the evidence that the section-house in question was in a place of danger from snow-slides, and that the defendant was aware of said danger at the time it engaged the plaintiff to keep its said section-house, then the defendant should have notified the plaintiff of said danger; and if you further find from the evidence that the defendant did not notify or apprise the
47 plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff."

2nd. The circuit court erred in instructing the jury as follows, to wit:

"The railroad company, it would seem, had provided this section-house and were willing to give the use of it to any one who would undertake to board their men in the locality, and undertook also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies who erect a boarding-house near their mines and then employ somebody to keep it. The use of the house may be given without rent and the company may undertake to collect the money from the workmen in the mine just as the railroad company did in this case, and it might occur in a hundred instances, probably does occur in very many, as in factories where the conveniences of living are not sufficient in and about the works; the company or individuals carrying on the work may keep a house of this kind and rent it to any one who shall board their men or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant."

48 3rd. The circuit court erred in instructing the jury as follows, to wit:

"The circumstance that the plaintiff here paid no rent for the

building is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principles applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant has occupied such a house having a contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it is given, but I believe I have seen it—in which a house was immediately above an excavation which had been made below for a mine and a caving occurred and the house fell into the excavation. The tenant going there without knowledge of the defect existing underground, if the landlord had knowledge and concealed the fact from him he may be liable to an action in respect to a matter of that kind. As you may see, the right of action results
49 from the concealment on the part of the landlord of a fact which he ought to make known to the tenant and not otherwise. Unless there is some wrong-doing, some omission of duty on the part of the landlord towards his tenant, there is no right of action; and if the defect be one which is as apparent to the tenant as to the landlord—open to the observation of all—then there is no right of action."

4th. The circuit court erred in instructing the jury as follows, to wit:

"Now, to apply this rule to cases of this kind: There can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built, as the scheme itself was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were under only one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter."

5th. The circuit court erred in instructing the jury as follows, to wit:

50 "They are not responsible for the condition of the country as that it was subject to snow-slides; they were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides; they could do these things without liability to any one, if they were done in a careful or prudent manner, just as a man who goes upon the mountain side to mine; he may be in a very dangerous locality; he may be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter. In going to such place, if he

uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there."

6th. The circuit court erred in instructing the jury as follows, to wit:

"So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road, if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be best, which, in the exercise of ordinary care and prudence, seemed to be the best suited for the work."

51 7th. The circuit court erred in instructing the jury as follows, to wit:

"Now, the question is whether this was done or whether there was anything in the circumstances which if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been in being there at the time of this snow-slide."

8th. The circuit court erred in instructing the jury as follows, to wit:

"Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black cañnon of the Gunnison river a rock-slide came down the mountain side and it was very near coming on the train which was passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of

52 the company for that. It was one of the dangers of the country in which their railroad was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character."

9th. The circuit court erred in instructing the jury as follows, to wit:

"If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended, whether he would be responsible to a tenant who should go into the house to locate in it in such a place."

10th. The circuit court erred in instructing the jury as follows, to wit:

"Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section-house in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it
53 ought to be submitted to the jury at all; but I have decided for the present, at least, to submit it to your judgment, since it may be more desirable that it should be determined by business men than by an officer of the court; so it is submitted for your consideration, with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use."

11th. The circuit court erred in its charge to the jury considered and taken as a whole.

12th. The circuit court erred in charging the jury substantially to the effect that they must find for the defendant.

54 13th. The circuit court erred in overruling the motion of the plaintiff for a new trial.

And the said Marcella Doyle prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that she may be restored to all things which she hath lost by occasion of the said judgment.

THOMAS M. PATTERSON,
CHARLES S. THOMAS,
Attorneys for Plaintiff in Error.

Endorsed on cover: Case No. 13,654. Colorado C. C. U. S. No. 101. Marcella Doyle, plaintiff in error, *vs.* The Union Pacific Railway Company. Filed September 25, 1889.

147 U.S. 413

DEC 13 1892
JAMES H. McKENNEY
CLERK

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1892.

(TERM NOS. 100 AND 101.)

MARCELLA DOYLE,
Plaintiff in Error,

vs.

THE UNION PACIFIC RAILWAY COMPANY.
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF OF PLAINTIFF IN ERROR.

T. M. PATTERSON,
Attorney for Plaintiff in Error.

DENVER, COLO.
NEWS PRINTING COMPANY.
1892.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1892.

(TERM NOS. 100 AND 101.)

MARCELLA DOYLE,
Plaintiff in Error,
vs.
THE UNION PACIFIC RAILWAY COMPANY.
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

In the month of January, 1886, Marcella Doyle, the plaintiff in error, brought two actions against the defendant in error, The Union Pacific Railway Company, in the Circuit Court of the United States for the District of Colorado. In the month of February, 1887, these actions, being, in general, based upon the same state of facts, were tried

together in said Circuit Court, to the same jury, and a verdict was rendered in each case in favor of the defendant. A motion for a new trial was afterwards interposed by the plaintiff, in each case, and denied by the court, and a judgment was therefore rendered, in each case, upon the verdict therein in favor of the defendant and against the plaintiff. The plaintiff has brought said causes to this Honorable Court by writs of error.

By reason of a stipulation, between counsel, to that effect, these causes will be briefed together, and the same brief filed in each.

One of said actions, Term No. 100, is based upon a statute of the State of Colorado, and was brought to recover damages for the death of six of plaintiff's children, caused, as is alleged, by the negligence of the defendant. The complaint in this action contains six separate counts, or causes of action, namely, one for the death of each child.

The material allegations of the first count or cause of action in said complaint, are as follows:

I.

That at the times hereinafter mentioned the defendant was a corporation, organized under the laws of the United States, and was in possession of and operating a railroad in the State of Colorado, called The Denver, South Park and Pacific Railroad, together with its tracks, locomotives, cars, and other appurtenances.

That before the happening of the things hereinafter stated, the defendant had built on said line of railroad, at a station called Woodstock, a section-house whereat to board and lodge its employees, and that said house was a frame building of a fragile nature in nowise calculated to resist a snow-slide.

II.

That at the times hereinafter mentioned the plaintiff was a widow and the mother of one Martin Doyle who was killed

as hereinafter stated; that the father of said Martin Doyle died on or about the 8th day of April, 1880. That said Martin had no wife or child living at the time of his death, was unmarried and of the age of twenty-three years, and had always made his home with the plaintiff and aided and assisted and was then aiding her in the support of herself and family, of which the defendant then and prior thereto had knowledge.

III.

That on or about the 5th day of November 1883, the plaintiff, at the request of the defendant, undertook and agreed with it, to keep the said section-house, to act for it as its section-house keeper, that by said agreement she was to provide and furnish board at said house for such of defendant's section hands and other employees, as it should desire, at and for four and one-half dollars per week each, to be paid for by such employees, but defendant was to aid her in the collection thereof by retaining it for her out of the wages of said employees. That she thereupon moved into said section-house with her family, and entered upon the discharge of her duties as such keeper, and continued to discharge the same until the occurrence of the snow-slide hereinafter mentioned, by which her said son, Martin, was killed.

IV.

That said section-house was situated in the mountains, and at the foot of large mountains in a locality where snow was accustomed to fall in the winter season of each year to great depths, and where dangerous snow-slides were liable to occur, and where one did occur in the early part of the spring or latter part of the winter next previous to November, 1883, and that by reason thereof the said house was an unsafe and dangerous place to live in during the winter and spring time of each year. That the defendant was well aware of said danger and of said previous snow-slide, at and

before the time the plaintiff moved into said house, and during the time she remained there. That neither the plaintiff, nor her said son, Martin, had any knowledge or notice of such previous snow-slide, or of the danger aforesaid, at any time before the occurrence of the snow-slide by which her said son, Martin, lost his life. That the defendant well knew, long before said snow-slide occurred, that her said son, Martin, was living with her in said section-house and assisting her in keeping the same; and that notwithstanding it was the duty of the defendant to notify the plaintiff and her said son, Martin, of said danger, yet it, neglecting its duty in this respect, did not at any time notify either the plaintiff or her said son, Martin, thereof, but knowingly and willfully withheld all information thereof from the plaintiff, and also from her said son, Martin. That the defendant also neglected and failed to erect or construct a suitable break or barrier to protect said section-house and the plaintiff and her family against said danger, but carelessly left them exposed thereto during the whole time she so kept said house.

V.

That on or about the 10th day of March, A. D. 1884, the snow, having previously fallen to great depths, in the locality of said section-house, and upon the mountain sides above and surrounding the same, broke loose from the mountain side above said house and swept down upon said house, crushing in the roof and demolishing said house, and killed her said son, Martin, and a number of other persons therein, whereby and by reason of the wrongful acts, neglects, and default of the defendant, in not notifying the plaintiff or her said son, Martin, of said danger, and in willfully withholding all notice and knowledge thereof from her and her said son, Martin, and in building the said house in said place, and in keeping the same there, and in not erecting a suitable break or barrier to protect said section-house

and its inmates from said danger, and without any fault or negligence on the part of the plaintiff or her said son, Martin, her said son, Martin Doyle, was killed; and whereby and by reason of the death of her said son, Martin, so caused as aforesaid by defendant, the plaintiff has sustained great damages, to wit, in the sum of five thousand dollars.

Each of the other counts in this complaint contains the same allegations as the first, except as to the name, age and sex of the child therein named, the same being so stated in this respect in each case as to suit the facts, but the second count, which relates to the plaintiff's son, Andrew Doyle, contains additional allegations, not in either of the other counts, and as follows, to wit:

"That at the time of his death, and for some length of time previous thereto, the said Andrew Doyle was and had been engaged at work for wages in the employ of the defendant as a section-hand on the same section of said railroad whereon the section-house hereinafter mentioned was located, and the said section-house was the place provided and designated by the defendant as the place at which the said Andrew was to board and lodge during the time he was so engaged at work for the defendant."

The complaint demands judgment for thirty thousand dollars and for costs of suit.

The answer of the defendant to this complaint denies, specifically, the allegations thereof.

The material allegations of the complaint in the other action, to wit, Term No. 101, are substantially those in the No. 100, except that the children are omitted, suit being for personal injuries to the plaintiff herself and the value of property destroyed.

The answer of the defendant to this complaint, denies, specifically, the allegations thereof.

And the evidence at said trial was as follows, to wit:

"That the plaintiff was at the several times named in the complaint a widow and the mother of the said Martin

Doyle, Andrew Doyle, Christopher Doyle, Catharine Doyle, Marcella Doyle, and Maggie Doyle, mentioned and named in the complaint as the children of the plaintiff and as having each and all been killed by a snow-slide at Woodstock in the month of March, A. D. 1884.

"That her husband and the father of said children had died previously to their death; that each of said children was of the age and sex stated in the complaint; was each unmarried and had no child or children, and had each lived with their said mother, making their home with her up to the time of their death, and were each then living with the plaintiff, aiding and assisting her in and about making a living and in and about her duties and labors in the keeping of the section-house of the defendant at Woodstock, in the County of Chaffee and State of Colorado, where said children were killed; that said children were all killed while in said section-house, on the 10th day of March, A. D. 1884, by a snow-slide, which then and there occurred from the mountain side above said section-house; that said section-house was built and used by the defendant as and for a section-house and a place at which the section-hands of the defendant who should work on said section could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with the defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of its railroad, in the County of Chaffee and State of Colorado; that by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section-house for such section-hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so furnished with such board, but the defendant was to aid and assist the plaintiff

in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board; that plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section-house with her family, and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snow-slide; on the 10th of March, A. D. 1884; that the defendant did not at any time notify or apprise the plaintiff or either of her said children, or cause her or either of them to be notified or apprised of the danger of a snow-slide or snow-slides or of the liability of a snow-slide or snow-slides at such place where said section-house then was or in that locality." And the plaintiff, further to maintain the issues of her part, introduced evidence tending to show that said section-house was a one-story frame building and was constructed in 1882, about the time that said railroad was first operated in that section of the country; was situated in the mountains, near the base of a high and steep mountain and in a place subject to snow-slides and dangerous on that account; that the sides of the mountain at the base of which was the house in question were marked by the tracks of former snow-slides, but only those familiar with snow-slides and their effects would know what they meant; that the defendant was aware of said danger at and before the time it engaged the plaintiff to keep its said section-house; that the plaintiff and her said children had never before resided in a region of country subject to snow-slides and had no knowledge of snow-slides or of their indications or of the dangers incident thereto, and was not aware of the particular danger in question; that there was a prominence or hip on this mountain side, about ten or twelve hundred feet above the section-house, which cut off a view of the mountain side above said hip from the section-house or its immediate vicinity; that above said hip there was a large depression or draw on the mountain side

extending from said hip to the summit, into which great quantities of snow fell and drifted during the winter season of each year, thus tending to create snow-slides of danger to persons in said section-house or its vicinity; that this danger was not apparent even to a person having knowledge of snow-slides and their causes without a view or examination of this mountain side above said hip; that the altitude of said section-house was about 10,200 feet, and of the summit of said mountain nearly 12,000 feet; that the snow-fall there was great in the winter season of each year, and that depressions on the mountain side were filled with snow by drifting; that the snow-slide of March 10th, 1884, which killed the said children, proceeded from this depression above said hip; that a snow-slide of less dimensions and of less scope and extent occurred there in February, 1883, in the same place and from the same source, which reached to within about two hundred feet of said section-house and of which the defendant had knowledge at the time thereof.

That the attention of the superintendent of the construction of said railroad and of said section-house was called to the fact of such danger, at or about the time said section-house was built, by one of the civil engineers of said defendant who assisted in locating the line of said railroad.

That the plaintiff was in said section-house at the time the said snow-slide of March 10th, 1884, occurred.

That through this prominence or hip on the mountain side there was a chasm or draw from twenty to thirty feet wide, which continued on down to the section-house, but became wider after leaving the hip; that with this draw another draw united about midway between the section-house and the said hip and formed one draw from their point of union to the section-house.

That this mountain is a part of the range of mountains known as the Continental Divide, which divides the waters of the Atlantic from those of the Pacific. At this point

above Woodstock station the course of the mountain is nearly east and west. This railroad passes this mountain by means of a tunnel called "Alpine tunnel," which is to the westward of a line north from Woodstock, and descends this mountain at a heavy grade, along the side thereof about midway between the section-house and the said hip on the mountain (which hip is termed a projection of rocks by some of the witnesses), and passes on to the eastward of Woodstock a considerable distance, where it turns and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section-house and said hip—the section-house being below and distant from this lower track about two hundred and thirty feet—and the two tracks forming this horseshoe are both between the section-house and said hip and on a direct line from the section-house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy feet higher in point of altitude where they cross this line from the section-house to the hip on the mountain side above; that there was a water-tank on the upper side of the lower track fifty or sixty feet to the westward of the section-house, which water-tank was injured by the snow-slide of February, 1883.

That the snow-slide of March 10th, 1884, spread out as it descended the mountain, so that where it passed over the lower railroad track its space in width was six or seven hundred feet, and the section-house was not far from the center of said snow-slide track.

That the contour of this mountain, beginning at the section-house and ascending the mountain, is about as follows, to wit: Above the section house it slopes slowly to the first railroad track; then there is a rock-slide; then there is a bench above that and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a space from three to four hundred feet in width of nothing

but rock, with a very steep slope, and above this slope some very steep rocks (the hip on the mountain side), and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet long to the summit of the mountain, which has an elevation or altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope of more than thirty-three degrees, and from the hip down there is quite a presipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber, and in and about the section-house there is a space of eight or nine hundred feet square on which there is no timber except three or four trees

That the timber on the mountain side was sparse and scattered; that only a few trees were carried down by the snow-slide; that snow-slides do not always follow beaten tracks make by former snow slides on the same mountain side, but frequently depart therefrom; that the snow-slide of March 10th, 1884, separated into broken fragments or divisions before reaching the base of the mountain, one of which struck the section house, resulting in the injuries complained of.

That the winter of 1883-4 was severer and the snow fell some deeper than the winter previous thereto, and that it snowed heavily and continuously from about the first of March to the 10th of March, 1884, and the trains had ceased to run on account of the snow; that ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift and after it had settled compactly; that it drifted greatly, filling up basins and depressions on the mountain sides; that there were rock-slides and existing evidences of former snow-slides on this mountain side above said section-house.

That the snow-slide of February, 1883, deposited snow and debris on the upper track of the railroad above said

section-house from twenty to twenty-five feet deep, and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

That her said son, Andrew Doyle, was an employee of the defendant—a section-hand on the same section where said section house was located—at the time he was so killed by said snow-slide; that the plaintiff and her said children were in said section-house at the time they were killed, and that neither of said children, nor the plaintiff, was aware of said danger before said snow-slide of March 10th, 1884, occurred.

That by and by reason of said snow-slide the six children of the plaintiff were killed, and the plaintiff herself sustained serious and permanent injuries to her person and was put to expense on account thereof, and also lost some valuable property.

The foregoing is the evidence in behalf of plaintiff as it is recited in the bill of exceptions (see Record).

Both of the cases were tried together before the same jury.

CHARGE OF THE COURT.

And the court charged the jury as follows:

"It is a rule of law, gentlemen, that whenever an injury comes to anyone through the wrongful act or negligence of another, that the person so injured may have a right of action to recover damages for the injury so sustained, and the statute enacts a rule which did not obtain prior to the statute, that "if death result from the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, entitle the party injured to maintain an action to recover damages in respect thereof, then and in every such case the person who, or the corporation which would have been liable if death had not ensued

shall be liable to an action for damages notwithstanding the death of the party injured." And in another section it is provided by whom the action may be maintained as the survivor whenever death is caused in the manner specified in this section.

"In this instance the plaintiff has brought two actions—one in her own right for the injury which she herself sustained in consequence of the snow-slide at this place in the month of March, 1884, and one for injuries resulting to her from the death of her children. The first is founded upon the general principle which I have mentioned, and the second upon this statute. The situation of the parties in respect to the controversy does not arise out of the application of any principles peculiarly applicable to railroads, and the circumstance that the defendant is a railroad company in this instance does not call for the application of any of the rules which are usually applied in cases of accident upon railroads.

"The railroad company, it would seem, had provided this section-house, and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies, who erect a boarding house near their mines and there employ somebody to keep it. The use of the house may be given without rent, and the company may undertake to collect the money from the workmen in the mine, just as the railroad company did in this case, and it might occur in a hundred instances—probably does occur in very many—as in factories, where the conveniences of living are not sufficient in and about the works, the company or individuals carrying on the work may keep a house of this kind and rent it to any one who shall board their men, or give the house free of rent in consideration of the undertaking of

the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant.

"The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principles applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant had occupied such a house having contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it is given, but I believe I have seen it—in which a house was immediately above an excavation which had been made below for a mine, and a caving occurred and the house fell into the excavation, the tenant going there without knowledge of the defect existing underground, if the landlord had knowledge and concealed the fact from him, he may be liable to an action in respect to a matter of that kind. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant, and not otherwise unless there is some wrong-doing—some omission of duty—on the part of the landlord towards his tenant. There is no right of action, and if the defect be one which is as apparent to the tenant as to the landlord, open to the observation of all, then there is no right of action.

"Now, to apply this rule to the cases of this kind, there can be no doubt that the railroad company undertaking to

build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built—as the scheme itself was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were only under one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter.

"They are not responsible for the condition of the country as that it was subject to snow-slides. They were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides. They could do these things without liability to any one if they were done in a careful and prudent manner, just as a man who goes upon the mountain side to mine; he may be in a very dangerous locality, he may be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter; in going to such place, if he uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there.

"So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be the best, which in the exercise of ordinary care and prudence seemed to be the best suited for the work.

"Now, the question is whether this was done or whether there was anything in the circumstances which, if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been, in being there at the time of this snow-slide.

"Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case: A year or two ago in the Black Canon of the Gunnison River a rock-slide came down the mountain side, and it was very near coming on the train that was passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of the company for that. It was one of the dangers of the country in which their road was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character.

"If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and th: question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended whether he would be responsible to a tenant who should go into the house to locate in it in such a place

"Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section-house in this place and maintaining it there, the right of action on the

part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to be submitted to the jury at all; but I have decided for the present at least to submit it to your judgment, since it may be more desirable that it should be determined by business men than by any officer of the court; so it is submitted for your consideration with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary that they should use.

"If you find against the company, then the question will be as to the measure of damages. As to that I have very little to say to you. In the action which the plaintiff herself has brought, which she herself has sustained, she has testified before you as to the nature and extent of the injury. It has disabled her to some extent, unqestionably, and she has lost some property. What may be your estimate of those things I cannot assume to say, and as to the others, the children, of course, that is a matter which rests also in your judgment. They were all of them, people who could work, and the estimate of the law is what she might receive from them in case their lives were prolonged in the way of support and maintenance as she would go on in life. They were working people, and, of course, the estimate, whatever it is, must be according to their capacity to earn money.

THE ERRORS ASSIGNED.

The errors assigned and relied upon are as follows:

FIRST.

The Circuit Court erred in refusing to give to the jury the following instruction asked by the plaintiff in error, to wit: "If the jury believe from the evidence that the section-house in question was in a place of danger from snow-slides, and that the defendant was aware of said danger at the time it engaged the plaintiff to keep its said section-house, then the defendant should have notified the plaintiff of said danger; and if you further find from the evidence that the defendant did not notify or apprise the plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff."

SECOND.

The Circuit Court erred in instructing the jury as follows, to wit:

"The railroad company, it would seem, had provided this section-house and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertake also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies who erect a boarding-house near their mines and then employ somebody to keep it. The use of the house may be given without rent and the company may undertake to collect the money from the workmen in the mine just as the railroad company did in this case, and it might occur in a hundred instances, probably does occur in very many, as in factories where the conveniences of living are not sufficient in and about the works; the company or individuals carrying on the work may keep a house of this kind and rent it to any one who shall board their men or give the house free

of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant."

THIRD.

The Circuit Court erred in instructing the jury as follows, to wit:

"The circumstance that the plaintiff here paid no rent for the building is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principles applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant has occupied such a house having a contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it is given, but I believe I have seen it—in which a house was immediately above an excavation which had been made below for a mine, and a caving occurred, and the house fell into the excavation. The tenant going there without knowledge of the defect existing underground, if the landlord had knowledge and concealed the fact from him he may be liable to an action in respect to a matter of that kind. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant, and not otherwise. Unless there is some wrong-doing, some omission of duty on the part of the landlord towards his tenant, there is no right of action; and if the defect be one which is as apparent

to the tenant as to the landlord—open to the observation of all—then there is no right of action."

FOURTH.

The Circuit Court erred in instructing the jury as follows, to wit:

"Now, to apply this rule to cases of this kind there can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built—as the scheme itself was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were under only one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter."

FIFTH.

The Circuit Court erred in instructing the jury as follows, to wit:

"They are not responsible for the condition of the country as that it was subject to snow-slides. They were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides. They could do these things without liability to any one if they were done in a careful and prudent manner, just as a man who goes upon the mountain side to mine; he may be in a very dangerous locality; he may be in a place, as in some places down in the San Juan country which is swept by snow-slides almost every winter; in going to such place, if he uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the

occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there."

SIXTH.

The Circuit Court erred in instructing the jury, as follows, to wit:

"So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road, if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be best, which, in the exercise of ordinary care and prudence, seemed to be the best suited for the work."

SEVENTH.

The Circuit Court erred in instructing the jury as follows, to wit:

"Now, the question is whether this was done or whether there was anything in the circumstances which if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been in being there at the time of this snow-slide."

EIGHTH.

The Circuit Court erred in instructing the jury as follows, to wit:

"Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black Canon of the Gunnison River a rock-slide came down the mountain side and it was very near coming on the train which was

passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of the company for that. It was one of the dangers of the country in which their railroad was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character."

NINTH.

The Circuit Court erred in instructing the jury as follows, to wit:

"If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended, whether he would be responsible to a tenant who should go into the house to locate in it in such a place."

TENTH.

The Circuit Court erred in instructing the jury as follows, to wit:

"Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section-house in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to be submitted to the jury at all; but I have decided for the present, as least, to submit it to your judgment, since it may be more desirable that it should be determined by business men than by an officer of the court; so it is submitted for your consideration, with

this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use."

ELEVENTH.

The Circuit Court erred in its charge to the jury considered and taken as a whole.

TWELFTH.

The Circuit Court erred in charging the jury substantially to the effect that they must find for the defendant.

POINTS OF LAW AND FACT.

The action (Term No. 100), which was brought to recover damages for the death of the children, is based upon a statute of the State of Colorado, concerning damages.

Gen'l Statutes of Colorado, 1883, p. 381.

Section one of said statute has no applicability to this case, except in so far as it provides who may sue for such damages, and it provides that such damages may be sued for and recovered as follows:

"*First*—By the husband or wife of deceased, or

"*Second*—If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of deceased, or

"*Third*—If such deceased be a minor or unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor."

The second section of said statute reads as follows:

"SEC. 2. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured."

And section three is as follows:

"SEC. 3. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the first section of this act, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars, with reference to the necessary injury resulting from such death to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."

By the first error assigned, it will be seen that the plaintiff asked the court to instruct the jury as follows, to wit:

"If the jury believe from the evidence that the section-house in question was in a place of danger from snow-slides and that the defendant was aware of said danger at the time it engaged the plaintiff to keep its said section-house, then the defendant should have notified the plaintiff of said danger; and if you further find from the evidence that the defendant did not notify or apprise the plaintiff of said danger, and that the plaintiff used due care in the

premises, and was not aware of said danger, then your verdict should be in favor of the plaintiff."

The court refused this instruction, and its refusal is assigned as error.

The defendant knew of the danger when it located and built the section-house—its attention having been called thereto by one of its locating engineers. (Record, Term No. 101, p. 11.) It knew of it from the indications and marks on the ground. (Record, Term No. 101, p. 10.) It knew of it from the snow-slide which occurred in February, 1883. (Record, Term No. 101, pp. 11, 12, 13.) It knew of it by reason of the furious and incessant snow-storm just prior to its occurrence. (Record, Term No. 101, p. 12.)

The plaintiff was the defendant's employee. Her son, Andrew Doyle, was its employee. And it was its duty, to notify them of said danger.

McGowan vs. The La Plata M. & S. Co., 3 McCrary, 397.
Thompson, Admr., vs. Railway Co., 4 McCrary, 631.
Boston vs. Roberts, 44 Cal, 187.
Strahlendorf vs. Rosenthal, 30 Wis., 675.

And likewise if plaintiff was its tenant.

Minor vs. Sharon, 112 Mass., 477.
Bowe vs. Hucking, 135 Mass., 380.
Cesar vs. Karutz, 60 N. Y., 229.

The plaintiff, if not an employee or lessee, was upon the premises of the defendant at its request and by its inducement, and it having knowledge of the danger, was in duty bound to notify her thereof.

Carleton vs. Franconia I. & S. Co., 99 Mass., 216.
Looney vs. McLean, 129 Mass., 33.
Bennett vs. Railroad Co., 102 U. S., 577.
Shear & Redf. on Negligence, 3d Ed., Secs. 498, 503.
Moaks Underhill on Torts, 252, 254, 258, 265, and cases cited in said authorities.

Through its entire charge to the jury the Circuit Court denied that such duty rested upon the defendant, and therein erred.

SECOND ERROR ASSIGNED.

The court instructed the jury as follows, to wit:

"The railroad company, it would seem, had provided this section-house and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies who erect a boarding-house near their mines and there employ somebody to keep it. The use of the house may be given without rent and the company may undertake to collect the money from the workmen in the mine just as the railroad company did in this case, and it might occur in a hundred instances, probably does occur in very many, as in factories where the conveniences of living are not sufficient in and about the works; the company or individuals may keep a house of this kind and rent it to any one who shall board their men, or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant."

In this it erred. The plaintiff was not the tenant of the defendant. The agreement between her and the defendant is the ordinary one between railroad companies and their section-house keepers. Section-houses are as necessary to the safe and successful operation of a railroad as section-hands, and constitute a part of the railroad. The defendant was in the possession of this section-house, while the plaintiff was there, to the same extent and just as fully to all intents and purposes as it was of its railroad track. The

premises, and was not aware of said danger, then your verdict should be in favor of the plaintiff."

The court refused this instruction, and its refusal is assigned as error.

The defendant knew of the danger when it located and built the section-house—its attention having been called thereto by one of its locating engineers. (Record, Term No. 101, p. 11.) It knew of it from the indications and marks on the ground. (Record, Term No. 101, p. 10.) It knew of it from the snow-slide which occurred in February, 1883. (Record, Term No. 101, pp. 11, 12, 13.) It knew of it by reason of the furious and incessant snow-storm just prior to its occurrence. (Record, Term No. 101, p. 12.)

The plaintiff was the defendant's employee. Her son, Andrew Doyle, was its employee. And it was its duty, to notify them of said danger.

McGowan vs. The La Plata M. & S. Co., 3 McCrary, 397.
Thompson, Admr., vs. Railway Co., 4 McCrary, 631.
Boston vs. Roberts, 44 Cal, 187.
Strahlendorf vs. Rosenthal, 30 Wis., 675.

And likewise if plaintiff was its tenant.

Minor vs. Sharon, 112 Mass., 477.
Bowe vs. Hucking, 135 Mass., 380.
Cesar vs. Karutz, 60 N. Y., 229.

The plaintiff, if not an employee or lessee, was upon the premises of the defendant at its request and by its inducement, and it having knowledge of the danger, was in duty bound to notify her thereof.

Carleton vs. Franconia I. & S. Co., 99 Mass., 216.
Looney vs. McLean, 129 Mass., 33.
Bennett vs. Railroad Co., 102 U. S., 577.
Shear & Redf. on Negligence, 3d Ed., Secs. 498, 503.
Moaks Underhill on Torts, 252, 254, 258, 265, and cases cited in said authorities.

Through its entire charge to the jury the Circuit Court denied that such duty rested upon the defendant, and therein erred.

SECOND ERROR ASSIGNED.

The court instructed the jury as follows, to wit:

"The railroad company, it would seem, had provided this section-house and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies who erect a boarding-house near their mines and there employ somebody to keep it. The use of the house may be given without rent and the company may undertake to collect the money from the workmen in the mine just as the railroad company did in this case, and it might occur in a hundred instances, probably does occur in very many, as in factories where the conveniences of living are not sufficient in and about the works; the company or individuals may keep a house of this kind and rent it to any one who shall board their men, or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant."

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very nature of the business of a railroad company demands that it should at all times have the exclusive possession of its section-houses. The contract between these parties does not make her a tenant. If she was a tenant, she had an estate in the premises, Bowe vs. Hunking, *supra*, and could not have been put out of possession, against her consent, without the aid and judgment of a court.

Her son, Andrew, who was killed by the snow-slide, was an employee of the defendant (Record, Term No. 100, page 32), and as to the relation between him and the defendant this instruction was erroneous and misleading, even if correct as to plaintiff.

THIRD ERROR ASSIGNED.

The court instructed the jury as follows, to wit:

"The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render service there which stood in lieu of rent between the parties, and the principles applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenants, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant has occupied such a house having a contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage result to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant, and not otherwise. Unless there is some wrong-doing, some omission of duty on the part of the landlord towards his tenant, there is no

right of action; and if the defect be one which is as apparent to the tenant as to the landlord—open to the observation of all—then there is no right of action."

This instruction is erroneous and misleading, in that an action for letting a house infected with a contagious disease, the lessor having knowledge thereof, is not restricted wholly to the ground of concealment, but is allowed on the ground of negligence alone.

Bowe vs. Hunking, 135 Mass., 380.
Minor vs. Sharon, 112 Mass., 477.
Cesar vs Karutz, 60 N. Y., 229.

If the plaintiff was a tenant, then the facts of this case should, like an action for letting an infected house, constitute an exception to the general rule of *caveat emptor.*

The danger was a hidden one. It lay in the basin on the mountain side, above the projection of rock or prominence, and could not be seen from the section-house or its immediate vicinity. (Record, Term No. 101, p. 11.) It was not "open to the observation of all," as the court, by this instruction, told the jury. It was known to the defendant, but not to the plaintiff or either of her children. The law will not presume her or them to have had a knowledge of this danger, especially in the face of the testimony to the contrary. (Record, Term No. 101, p. 11.)

McGowan vs. The La Plata M. & S. Company, 3 McCrary, 397.

It was not a thing within the common knowledge of mankind. Snow slides occur in but few places—even in the mountains—and are known to but few persons. They occur mostly from mountains which, like the one in question, have draws or basins upon their sides, where the snow may collect in great quantity, and not from mountains of a comparatively smooth surface. The plaintiff and her children could not be presumed to anticipate and look for that which they never heard tell of, and knew nothing about, and to ascend this mountain side over a thousand

feet to make the necessary inspection. Not one person in a thousand knows anything of snow-slides, or their origin or danger.

FOURTH ERROR ASSIGNED.

The court instructed the jury as follows, to wit:

"Now, to apply this rule to cases of this kind: There can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built, as the scheme was one which was lawful, which the company could properly engage in—just as men may carry on mining wherever they can find mines—that they were under only one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter."

This is clearly erroneous, in that the jury are told that the only care to be used by defendant is a care which concerns wholly the property of the defendant. Certainly this cannot be sustained. This language is nowhere sufficiently explained or qualified by the other instructions of the court.

This same objection applies to the instructions of the court noted in the fifth, sixth and seventh errors assigned, and to each of said instructions, which instructions are as follows, to wit:

Fifth—"They are not responsible for the condition of the country as that it was subject to snow-slides; they were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides; they could do these things without liability to any one, if they were done in a careful or prudent manner,

just as a man who goes upon the mountain side to mine; he may be in a very dangerous locality; he may be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter. In going to such place, if he uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there."

Sixth—"So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road, if they thought proper to do so. If a section-house was needed there, all that was required of them was to put it in the place which seemed to be best, which, in the exercise of ordinary care and prudence, seemed to be the best suited for the work."

Seventh—"Now, the question is whether this was done or whether there was anything in the circumstances which if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been in being there at the time of this snow-slide."

These instructions, together with the one noted in the fourth error assigned, taken as a whole or separately, are each and all misleading and otherwise erroneous.

Each of them tells the jury, in effect, to find for the defendant. They each and all taken together or separately, impressed the jury with the idea, that the defendant had the right to build and maintain this section-house where it did, and that however great the danger to persons going there,

it was under no obligation on that account to the plaintiff or either of her children, or to any of its employees whom it might send there to work for it, or to any person who might be invited or induced to go there on business with defendant.

EIGHTH ERROR ASSIGNED.

The court instructed the jury as follows, to wit:

"Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black Canon of the Gunnison River a rock-slide came down the mountain side, and it was very near coming on the train which was passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of the company for that. It was one of the dangers of the country in which their road was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character."

We make the same objections to this instruction as to the instructions noted in the fourth, fifth, sixth and seventh errors assigned. The company was bound to use a care other than that which concerned its own property, and besides it was bound to use such care as was proportioned to and commensurate with the danger to be avoided, and this and the other instructions are objectionable for the reason that they leave the jury to infer that the same degree of care will apply in all cases.

NINTH ERROR ASSIGNED.

The court instructed the jury as follows, to wit:

"If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended—whether he would be responsible to a tenant who should go into the house to locate in it in such a place."

This instruction is subject to all the objections made to the preceding instructions. And it is objected to because it tells the jury inferentially, at least, that the plaintiff and her children were each and all tenants of defendant, and that as such they assumed the risk.

TENTH ERROR ASSIGNED.

And the court further instructed the jury as follows:

"Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section-house in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to be submitted to the jury at all; but I have decided for the present at least to submit it to your judgment, since it may be more desirable that it should be determined by business men than by any officer of the court; so it is submitted for your consideration with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or what-

ever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use."

This instruction is, in effect, a direction to the jury to find for the defendant

By the eleventh and twelfth errors assigned, the objection is made to the charge of the court, taken as an entirety, that it is but a direction to the jury to find for the defendant.

And we here make the general objection to each and every of the preceding instructions, that they are, and each of them is, in effect, a direction to the jury to find for the defendant.

And we also make the general objection to each of said instructions, that it ignores and denies the proposition that the defendant was under an obligation to notify the plaintiff or her children of the danger in question.

The court assumes that this danger was common to the country. This is not warranted by the evidence, and is contrary to experience. It was only common to certain localities near the Snowy Range and near to mountains that are of such contour as to produce snow-slides.

A short distance from the base of such mountains there is no such danger. The plaintiff was not bound to prove that there was a safe place for a section-house near where this one was built. Nor should the fact be presumed that there was no safe place near there, in the face of the experience of mankind to the contrary. It was sufficient for the plaintiff to prove that the house was in a place of danger, the defendant's knowledge thereof, and its failure to notify her or her children of such danger.

We respectfully submit that the judgment in each case should be reversed.

THOMAS M. PATTERSON,
Attorney for Plaintiff in Error.

147 U.S. 413

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 100.

MARCELLA DOYLE,
Plaintiff in Error,
vs.
THE UNION PACIFIC RAILWAY COMPANY.

No. 101.

MARCELLA DOYLE,
Plaintiff in Error,
vs.
THE UNION PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR DEFENDANT IN ERROR IN BOTH CASES.

JOHN F. DILLON,
HARRY HUBBARD,
For the Defendant in Error.

C. G. BURGOYNE, Cor. Walker and Centre Sts., N. Y.

Supreme Court of the United States.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR DEFENDANT IN ERROR IN BOTH CASES.

Only one brief is filed for defendant in error in the two suits, as they involve the same question in this Court and were tried before the same jury in the Court below (Records, Case No. 100, p. 28; Case No. 101, p. 8).

Statement of the Cases.

These two actions were brought in the Circuit Court of the United States for the District of Colorado by Marcella Doyle—No. 100, to recover for damages alleged to have been suffered by her by reason of the death of her six children, and No. 101, to recover for alleged injuries to herself. Plaintiff alleged, as the ground of the actions, that such deaths and injuries were caused by the negligence of the defendant in error. Both actions were tried as one case, and the jury rendered a verdict for the defendant in each (Records, Case No. 100, pp. 27–9; Case No. 101, pp. 7–9). Motions for a new trial were denied, and judgments rendered for defendant in each action (Records, Case No. 100, p. 29; Case, No. 101, p. 9). Plaintiff filed bills of exceptions, and now brings the cases to this Court by writs of error (Records, Case No. 100, pp. 30–42, 44; Case No. 101, pp. 10-22, 23). The exceptions taken and the assignments of error, so far as they can be considered by this Court, relate solely to instructions to the jury (Records, Case No. 100, pp. 30–42, 46–50; Case No. 101, pp. 10–22, 26–29). It is assigned for error that the Court below overruled the motions for new trials (Records, Case No. 100, p. 49; Case No. 101, p. 29); but that question is not reviewable by this Court. The bills of exceptions contain a statement of what the evidence showed or tended to show (Records, Case No. 100, pp. 30–34; Case No. 101, pp. 10–14). As that statement is very brief, we merely refer to it here, and make no restatement of the evidence.

ARGUMENT.

The injury, if any, to plaintiff, and the deaths of her children, were caused by a snow-slide. This is shown by evidence which, as to that fact, was not contradicted. The snow-slide, in turn, was the result of natural causes—the great and unusual accumulation of snow in the mountains, and other natural forces. This fact also was established by uncontradicted evidence. At the time of the snow-slide plaintiff and her children lived in the mountains in a house owned by the defendant. She was the tenant, and the defendant was the landlord. The whole region was 10,000 or 12,000 feet above the sea level, was covered with snow a large part of the year, was mountainous, and was, quite naturally, subject to snow-slides. The plaintiff moved into the house in November, 1883, and the snow-slide occurred March 10, 1884.

The plaintiff seeks to hold the defendant liable for the alleged injury to herself, and, in a separate action, for the deaths of her children, caused by the snow-slide. The case was clearly an accident, the cause of which was natural forces—*vis major*—or what is known in law as the act of God. There is no room for argument on this proposition. The evidence—plaintiff's as well as defendant's—in the bills of exceptions proves it beyond any dispute.

The relation between the railway company and plaintiff was that of landlord and tenant. The question presented by this case, then, is whether the landlord is liable to the tenant for an injury caused by *vis major*, or the act of God. The bare statement of

the question is its own answer. Nevertheless, we proceed to show by the well-settled principles of law and adjudged cases, applicable to the present case, that no liability exists.

I.

The relation between the Railway Company and Mrs. Doyle was that of landlord and tenant—of lessor and lessee at will.

The Court below held that the relation of the parties was that of landlord and tenant (Records, Case No. 100, p. 36; Case No. 101, p. 15).

Washburn defines an estate at will as follows:

"An estate at will in lands is that which a tenant has by an entry made thereon under a demise to hold during the joint wills of the parties to the same."

1 Washburn Real Property, Bk. I., Ch. XI., § 1, Par. 1.

An estate at will differs from an easement in that "*an easement is always distinct from the occupation and enjoyment of the land itself;*" and differs from a license in that a license is merely "an authority to do *a particular act or series of acts* upon another's land, without possessing any estate therein."

1 Washburn Real Property, Bk. I., Ch. XII., § 2, Par. 1, 2.

The agreement in the present case was that the railway company should permit Mrs. Doyle to occupy its house, and that she, on her part, should occupy the same and should board certain employees of the rail-

way company at a certain rate. No other rent was stipulated; and the occupation was to continue during the will of the railway company (Records, Case No. 100, pp. 30-31; Case No. 101, p. 10).

This was clearly a lease at will for a rental consideration. Of course rent need not be money. But after entry was made, this transaction constituted an estate at will, whether it be regarded as a lease for a consideration, or without consideration.

Washburn Real Prop., Bk. I., Ch. XI., § 1, Par. 1, 3; Bk. I., Ch. X., § 1, Par. 3.

"Thus *a person who holds rent-free by permission of the owner*, or who enters upon the premises under an agreement to purchase, or for a lease, but has not paid rent, or refuses to accept a lease, *is strictly a tenant at will*" (Citing cases).

Taylor, Landlord and Tenant, § 60.

This is true, though the occupation is expressed only to be during the will of the railway company; it was also, as a matter of law, equally at the will of Mrs. Doyle. In other words, it was, like an ordinary tenancy at will, at the will of *both* parties.

Washburn Real Prop., Bk. I., Ch. XI., § 1, Par. 6.

Mrs. Doyle was not an employee of the railway company; it did not undertake to manage the boarding house, receive the board money, pay the expenses and take the profits or suffer the losses, nor to pay Mrs. Doyle for services; but Mrs. Doyle was the proprietor; she managed the house, received the board money, paid the expenses, and took the profits or suffered the losses. The railway company could not call upon her for any portion of her time, and she performed no serv-

ices for the railway company. Indeed, she did not stand in the relation of employee or servant even to the men whom she boarded; their relation was merely the contract relation of boarding-house keeper and boarder —for all the purposes of this case, like innkeeper and guest—both were principals. Mrs. Doyle was none the less a tenant, because she agreed to receive as boarders men employed by the railway company, or because the company agreed to assist her in collecting her pay for board. Even if the company be regarded as engaging board for its men, and agreeing to pay therefor, still the relation in this respect is merely the ordinary relation of contract for board, in which each party is a principal, and neither is the servant or employee of the other. Such a contract might equally well have been made if Mrs. Doyle had been the owner of her own house, and in such case no one would think of calling her an employee or servant of the railway company. It does not alter the case if she hired her house from the company, nor even if she obtained it from the railway company rent free.

Mrs. Doyle, therefore, was the tenant of the railway company.

The relation of the children of Mrs. Doyle was that they occupied under her; and no different case is presented as to them from that which is presented as to Mrs. Doyle herself.

Taylor, Landlord and Tenant, § 175*a*.
Bowe vs. Hunking, 135 Mass., 380.
Jaffe vs. Harteau, 56 N. Y., 398.
—all quoted *infra*, Point II.

II.

In the absence of fraud, misrepresentation or deceit as to the condition of the premises, the landlord is not liable for any injury suffered by the tenant during his occupancy, even if such injury be caused by the defective or unsafe condition of the premises, much less if it be caused by external forces—fire, water, tornado, snowslide, earthquake or other natural forces—the act of strangers or the act of God. There was no fraud, misrepresentation or deceit, and, therefore, no liability on the part of the defendant in the present case.

The maxim and rule of the common law, as between landlord and tenant, is *caveat emptor*. The intending tenant hires what he hires. He may examine and inquire for himself, and, if he does not choose to do so, he alone suffers. It is true, if the landlord makes *misrepresentations*, or is guilty of *deceit*, and the tenant is injured in consequence, then the landlord is liable *in an action for the deceit*. But the landlord is not liable for a *mistake of the tenant as to the condition or safety* of the premises. Now, in the present case, there was no evidence showing misrepresentation or deceit; and, even if there had been, there was no request to charge upon any such supposed evidence. There was, indeed, no evidence of any defect in the premises about which to make a misrepresentation or practice a deceit. The only alleged failure of duty on the part of the landlord was, not that it practised any deceit or made any misrepresentation, but that it *failed*

to volunteer information and warning to the intending tenant, and this, too, information not about the premises themselves, but about the forces of nature in the vicinity. To require this would be to convert the landlord into a warrantor that the house was safe, and safe not merely as respects itself, but safe as against the forces of nature, to which the region was subject. Such is not the law. On the contrary, the landlord is not a warrantor even of the condition of the house itself, much less against the forces of nature—*vis major*, or the acts of God.

In the present case the law did not imply any warranty on the part of the landlord that the house was reasonably fit for occupation; much less did the law imply any warranty that no accident should befall the tenant from external forces, and especially not from the forces of nature, storm, tornado, earthquake, rain, snow, flood, or snow-slide; indeed all these latter are *vis major*, or the act of God, for which no human being is morally or legally responsible. The law on this point is abundantly well settled.

"**No Implied Warranty as to Condition of Leased Property**—There is no implied warranty on the letting of a house, that it is safe, well built, or reasonably fit for habitation; or of land, that it is suitable for cultivation, or for any other purpose for which it was let. And where a person hired a house and garden for a term of years, to be used for a dwelling-house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an

abandonment of the premises under these circumstances forms no defense to an action for rent. And, IN ALL CASES *where a tenant has been allowed, upon suggestions of this kind, to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a* FRAUDULENT MISREPRESENTATION OR CONCEALMENT as to the state of the premises which were the subject of the letting; *or else* the premises proved to be uninhabitable by *some wrongful act or default of the landlord himself.* The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may, in this respect, amount to a deceit practiced upon the lessee."

Taylor Landlord and Tenant, § 382.

Liability to Tenant for Injuries—The lessor's liability to the lessee is, however, much more restricted. As the former does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their state; *for any injury suffered by him during his occupancy by their defective condition, or even faulty construction, he cannot make the lessor answerable, unless there was misrepresentation, active concealment or perhaps even a total inability on the tenant's part to discover the defect before entry.* And the sub-tenant, servant, employee or even customer of the lessee is under the same restriction; because entering under the tenant's title, and not by invitation, express or implied, from the owner, they assume a like risk."

Taylor, Landlord and Tenant, § 175*a*.

The last part of the rule here stated applies to the case of the deaths of the children of Mrs. Doyle. There is no liability in respect to them any more than in respect to the injury to Mrs. Doyle herself.

In a note to § 382, *supra*, the same author says: "The point of conflict in the authorities has been *to deter-*

mine when the failure by the landlord to disclose a defect is CONCEALMENT OR ACTIVE DECEIT. Of course, where he directly leads by words or conduct to a false impression as to the existence of a nuisance, he is liable therefor."

It seems hardly necessary to state that there can be no question as to any "*concealment or active deceit*" in the present case. The assumption would be absurd. What would be the concealment or deceit complained of? Why, this, that the region was subject to snow slides. This was a notorious fact, well known throughout the whole region. To suppose that the defendant would undertake to conceal this fact, or could do so if it would, is simply preposterous. The plaintiff's case assumes that it is the duty of the intending landlord in such a region to volunteer to the intending tenant information of such a well-known fact. This, moreover, is a fact, not in respect of the premises, but in respect to the phenomena of nature in the vicinity. There is no such absurd rule of law.

Another learned author states the general rule as follows:

"There is, moreover, no implied duty in the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation. Nor is there any implied warranty on the letting of a house, or of land, that it is or shall be reasonably fit for habitation, occupation or cultivation. Neither does the law imply a contract, still less a condition, on the demise of real property, that it is fit for the purpose for which it is let."

Smith on Landlord and Tenant (3d Lond. Ed., 1882), p. 337.

In a recent case in this Court Mr. Justice GRAY said:

"By that law (the common law, unlike the civil law) the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased" (citing cases).

Viterbo vs. Friedlander, 120 U. S., 707, 712.

The principles applicable to the present case have been well stated in the recent case of *Bowe vs. Hunking*, 135 Mass., 380. The syllabus states the case and decision as follows:

"A tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which has been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord; the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it, and it bore his weight, and he thought it would bear anybody's weight."

The Judge directed a verdict for defendants, and the Supreme Court sustained this ruling. FIELD, J., giving the opinion of the Court, said (p. 383):

"There is no implied warranty in the letting of an unfurnished house or tenement that it is reasonably fit for use (citing cases). The tenant takes an estate in the premises hired, and persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter his premises (citing cases).

"In the case at bar, there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained, it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase; this duty, if it exists, does not arise from the contract between the parties, but from the relation between them, and is im-

posed by law. If such a duty is imposed by law, it would seem that there is no distinction as a ground of liability between an intentional and an unintentional neglect to perform it; but in such a case as this is, there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon defendants.

"A tenant is a purchaser of an estate in the land or building hired; and *Keates vs. Cadogan*, 10 C. B., 591 (and *infra*), states the general rule that *no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty* or *of active deceit*. See also *Robbins vs. Jones*, 15 C. B. (N. S.), 240. This is the general rule of *caveat emptor*. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. *Hight vs. Bacon*, 126 Mass., 10; *Ward vs. Hobbs*, 3 Q. B. D., 150; *Howard vs. Emerson*, 110 Mass., 320. This rule does not apply to cases of fraud."

This rule of *caveat emptor* has been applied also in many other cases, some of which we now refer to.

Keates vs. Cadogan, 2 Engl. Law and Eq., 318; S. C., 20 Law J. Rep. (N. S.), C. P., 76, was an action on the case. The declaration stated in substance that the defendant *knew* that the house was in such a ruinous and dangerous state as to be dangerous to enter, occupy or dwell in, and was likely to fall and thereby do damage to persons and property therein; that the plaintiff was without any knowledge, notice or information whatever that the said house was in said state or condition; that the defendant let the house to plaintff

without giving plaintiff any notice of the condition of the house; and that plaintiff entered, and his wife and goods and business were injured. Defendant demurred to the declaration and the Court unanimously sustained the demurrer. JERVIS, C. J., giving the opinion said (p. 322):

"It is not contended that there was any warranty that the house was fit for immediate occupation; but it is said that, because the defendant knows it is in a ruinous state, and does nothing to inform the plaintiff of that fact, therefore the action is maintainable. It is consistent with the state of things disclosed in the declaration, that, the defendant knowing the state of things, the plaintiff may have come to him and said, 'Will you lease that house to me?' And the defendant may have answered, 'Yes, I will.' *It is not contended by the plaintiff that any misrepresentation was made;* nor is it alleged that the plaintiff was acting on the impression produced by the conduct of the defendant as to the state of the house, or that he was not to make investigations before he began to reside in it. I think, therefore, that the defendant is entitled to our judgment, *there being no obligation on the defendant to say anything about the state of the house, and no allegation of deceit. It is an ordinary case of letting.*"

In *Jaffe vs. Harteau*, 56 N. Y., 398, the Court of Appeals of New York say (p. 401):

"The question then is whether a lessor of buildings, in the absence of fraud or any agreement to that effect, is liable to the tenant or others lawfully upon the premises by his authority for their condition, or that they are tenantable, and may be safely and conveniently used for the purposes for which they were apparently intended. This question must be regarded as settled by authority" (citing cases in English and American courts).

In that case the under-tenant attempted to hold the lessor liable for an injury which resulted from an ex-

plosion of a boiler in the kitchen, which was alleged to be due to defective construction of the boiler or its connections. There was no evidence tending to show that the lessor knew or had any reason to suspect that the boiler was improperly constructed, or that any danger was to be apprehended from its use.

In *Brewster vs. DeFrewery*, 33 Cal., 341, the owners of a brick building let it to a tenant on a monthly letting. While the tenant occupied it, the owners of an adjoining lot excavated it for the purpose of erecting a building thereon. The lessors had timely notice of such excavation, and that in consequence thereof there was imminent danger that the wall of the brick building would fall unless proper means should be taken to prevent it. No means were taken by the lessors. The wall and whole building fell and crushed the tenant to death. An action stating these facts (but not alleging any covenant to repair) was brought by the administratrix under the statute. The Court sustained a demurrer to the complaint on the ground that the lessors were not bound to keep the building in a safe or habitable condition. The Court said (p. 345):

"*The house did not fall in consequence of any act of the owners, but in consequence of the acts of parties owning the adjoining lot,* in excavating it for purposes of their own, after the deceased entered into the possession of the demised premises under the lease. There was no covenant on the part of the lessor, the defendant, to uphold or keep the premises in repair, or in a habitable condition. Without an express covenant to that effect, they were not bound to repair or to keep the premises in a habitable condition." Citing with approval, *Keates vs. Cadogan, supra,* and other cases.

So, in the present case, the snow slide did not come "in consequence of any act of the owner," the railway company; but it came as the result of natural causes—*vis major*, or the act of God.

The rule of *caveat emptor* was also applied in the recent case of *Woods vs. Naumkeag Steam Cotton Company*, 134 Mass., 357.

Defendant was owner of a tenement house, fitted for four families, and plaintiff was tenant at will, or wife of tenant at will. There were three stone steps, leading down from the yard to the street, on which ice and snow had accumulated, and on which plaintiff slipped and received the injury complained of. There was evidence tending to prove that at the time plaintiff was injured she was in the exercise of due care. The jury viewed the premises. Plaintiff contended that the steps were of such material and constructed in such manner that they occasioned the accumulation of snow and ice thereon improperly; and that defendant's omission to place a rail on either side, or to take other reasonable measures to prevent one from falling, was such negligence as would render the defendant liable. But the trial Court *held there was no evidence to go to the jury*, and directed a verdict for defendant; and the Supreme Court sustained this ruling. FIELD, J., giving the opinion, says (p. 359)

"There may be cases in which the landlord is liable to the tenant for injuries received from *secret* defects, which are known to the landlord and are concealed from the tenant, but this case discloses no such defects in the steps" * * * (p. 361). The ice and snow were the proximate cause of the injury.

"The exceptions state that no railing had ever been placed on either side of the steps, that the jury viewed the premises, and that it was contended 'that the steps were of such material and constructed in such manner, that they occasioned the accumulation of ice and snow

called very early in the morning following the receipt of it on the holder of the tobacco, and, ascertaining that they had received no intelligence of peace, purchased it at a great profit. The contract was contested for fraud and concealment. Chief Justice MARSHALL delivered the opinion of the Court to the effect that that the buyer was not bound to communicate intelligence of extrinsic circumstances, which might influence the price, though it were exclusively in his possession. And Chief-Justice GIBSON, in *Kintzing vs. McElrath*, 5 Barr, 467, in commenting on this decision, says: 'It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.' See also *Hersey vs. Keembortz*, 6 Barr, 129. When the information is derived from strangers to the parties negotiating, and not affecting the quality or title of the thing negotiated for, it is not such as the opposite party can call for. We see no error in the rejection of the evidence on account of this part of the proposition, as there was no moral or legal obligation for the lessor to disclose any information he had on the subject of the intended improvement of the adjoining lot. It was not in the line of his title. It was derived from a stranger; it might be true or false; and the lessees could have got it by inquiry, as well as the lessor.

"It is well settled that there is no implied warranty that the premises are fit for the purposes for which they are rented (citing authorities), nor that they shall continue so, if there be no default on the part of the landlord."

See also *Carstairs vs. Taylor*, L. R., 6 Ex., 217, a case where the rats had gnawed a hole through which water from a gutter poured into the tenant's premises, and he sought to hold the landlord liable.

The Court say (p. 221): "Here the accident was due to *vis major*, as much as if a thief had broken through the hole in attempting to enter the house, or a flash of lightning or a hurrricane had caused the rent. There is, therefore, no foundation for the plaintiff's claim, and the rule must be refused."

Therefore, in the present case, as there was no fraud, misrepresentation or deceit on the part of the defendant in letting the house to plantiff, there was no liability for the injury or deaths caused by the snow-slide.

III.

The instruction requested by plaintiff was rightly refused.

The plaintiff requested the Court to instruct the jury as follows (Records, Case No. 100, pp. 34, 35; Case No. 101, p. 14):

"If the jury believe from the evidence that the section house in question *was in a place of danger from snow-slides*, and that the defendant was aware of said danger at the time it engaged the plaintiff to keep its said section house, *then the defendant should have notified the plaintiff of said danger;* and if you further find from the evidence that the defendant did not notify or apprise the plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff."

This instruction was rightly refused.

(a) There was nothing in the evidence which showed or tended to show any misrepresentation or deceit on the part of the defendant; and, as we have seen above, in the absence of misrepresentation or deceit (or direct wrongful act) there is *no liability on the part of the landlord for any injury that may happen to the tenant while he is in the occupation of the premises.*

thereon improperly.' The steps were of rough-split, unhewn granite, and the 'structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received her injury.' *The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant.*"

The following case is specially pertinent as showing that there was no duty on the part of the defendant to give plaintiff notice that the house was in a region of danger from snow-slides. *Hazlett vs. Powell*, 30 Pa. St., 293, was an action of replevin, in which an apportionment of rent was claimed by the tenant of a hotel on the ground that he had been partially evicted by the act of an adjoining owner in building so that the tenant's light and air from one side of his hotel were shut off or obstructed, and as a result that the hotel was rendered *pro tanto* unfit for the purpose for which it was intended to be used. There was an offer to prove certain facts (p. 294) which the Court states as follows (p. 297):

"But the rejected proposition also contained an offer to prove that the lessor knew at the time of executing the lease that the adjoining owner intended building on his lot—at what time was not offered to be shown—and did not communicate this information to the lessees. We think he was not bound to do so; and that if the evidence had been received it would have furnished no evidence of fraud on the part of the lessor, or become the foundation in equity for relief of the lessee The substance of the complaint regarded some thing that the lessor was no more presumed to know than the lessees; it was nothing which concerned the title of the lessor or the title he was about to pass to the lessees. It was a collateral fact—something only within the knowledge and determination of a stranger to both parties, and, if material to

either, I can see no obligation resting on either side to furnish to the other the information. It was not alleged that the lessor made any representations on the subject, or that there was any concealment of the information; or that any relation of trust and confidence existed between the parties; or that the lessees were misled by his silence and entered into the contract under the belief that the vacant lot would not be occupied; or that they were in a position in which they could not by diligence have ascertained the fact for themselves, and that they were not legally bound to take notice of the probability that the ground would be occupied by buildings, and inquire for themselves. These were elements to be shown to constitute fraud and make the testimony available.

"'The general rule, both in law and equity,' says *Story on Contracts*, § 516, 'in respect to concealment is, that mere silence in regard to a material fact, which there is no legal obligation to disclose, will not avoid a contract, although it operates as an injury to the party from whom it is concealed.' But the relation generally which raises the legal obligation to disclose facts known by one party to the other, is where there is some especial trust and confidence reposed, such as where the contracting party is at a distance from the object of negotiation, when he necessarily relies on full disclosure; or where, being present, the buyer puts the seller on good faith by agreeing to deal only on his representations. In all these, and kindred cases, there must be no false representations, nor purposed concealments; all must be truly stated and fully disclosed. 'The vendor and vendee,' says *Atkinson on Marketable Titles*, 134, 'in the absence of special circumstances, are to be considered as acting at arm's length. When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other, is not requisite to the validity of the contract *(Id.)*. Illustrative of this is the celebrated case of *Laidlaw vs. Organ*, 2 Wheaton, 178. The parties had been negotiating for the purchase of a quantity of tobacco; the buyer got private information of the conclusion of peace with Great Britain, and

(b) Further, even if there were such evidence, the above request to charge does not assume its existence and request a charge accordingly. This alone is fatal to the instruction.

The instruction assumes merely that there was evidence that the defendant knew of such danger and "did not notify or apprise plaintiff of said danger" (from snow-slides); but it does not assume that there was any evidence of any facts to create any obligation on the part of the defendant to warn plaintiff of danger, other than the mere fact that the plaintiff was the tenant of the defendant. But, as we have seen above, such relationship of landlord and tenant does not create any such obligation.

There was no evidence which showed, or tended to show, that there was any danger from snow-slides which was *secret and peculiar* to the house *and known only to the landlord* and not ascertainable by due diligence on the part of the tenant (such as has always been the fact where the landlord has been held liable, as in the small-pox cases); but the danger was the open and well-known danger which was common to the whole region. But here, again, even if there had been such evidence, still *the instruction requested and refused was not based upon any such assumed evidence.*

This instruction requested by plaintiff proceeds upon the assumption that it was enough to render the defendant liable if the house "*was in a place of danger from snow-slides*" generally; provided, of course, the other facts assumed in the instruction were true. The language of the instruction was: "If the jury believe from the evidence that the section house in ques-

tion was *in a place of danger from snow-slides*," &c. Of course, it was in "a place of danger from snow-slides;" the whole region was "*a place of danger* from snow-slides," just as the sea is "*a place of danger*" from shipwreck, and just as a malarious region is "*a place of danger*" from malaria. The jury must necessarily have found, therefore, that the section house was in a place of some danger from snow-slides. But this fact (with the others assumed in the instruction) is not enough to render the defendant liable. All this may be true, and yet there be no fault or liability on the part of defendant, because there is no obligation on the part of the landlord to notify the tenant of any such danger. Under such an instruction the jury would have been compelled to find, or might have found, a verdict for plaintiff if they had found that the house was "in a place of *any* danger from snow-slides," and that the defendant had not notified plaintiff of such danger. There was no qualification such as that the jury must find that the danger was *secret and peculiar to the house*, and that the defendant knew of such secret and peculiar danger; but the jury would have been obliged to find, or might have found, a verdict for plaintiff, even if the danger had been only the general danger that snow-slides would occur in the region.

As has already been stated, there was no obligation on the part of the defendant to warn the plaintiff of the general dangers incident to the place or region. This proposition is so clear that it requires hardly more than its bare statement. The plaintiff was exposed to the general dangers of the place or region—including snow-slides—whether she lived in a house of the defendant or in some other house. If a man

goes into a malarious region and hires a house, the landlord is under no obligation to warn him of the dangers of malaria; such danger is not secret or peculiar to the house, and the landlord is in no way responsible therefor. A man must, at his own peril, ascertain such dangers which are incident to the place or region before he goes there to live. *The being in the region* was what exposed plaintiff to these dangers. It does not appear that the defendant was in any way responsible for plaintiff's being in the region. The defendant was simply her landlord. The general danger from snow-slides was not a secret, hidden danger; but an open and well-known danger of the whole region: The defendant was not guilty of any deceit, and made no misrepresentation in not warning plaintiff of such dangers, and there was no obligation to give such warning, and no liability for not giving it.

As well might a plaintiff, in a case of injury from shipwreck, request the Court to instruct the jury that:

"If the jury believe, from the evidence, that the ship [section house] in question was in a place of danger from shipwreck [snow-slides], and that the defendant was aware of said danger at the time it received the plaintiff as a passenger [engaged the plaintiff to keep its said section house], then the defendant should have notified the plaintiff of said danger; and if you further find, from the evidence, that the defendant did not notify or apprise the plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff."

Every one knows that a person who is upon the sea is in "a place of danger from shipwreck;" so a person who is in a mountainous place or region

which is subject to snow-slides is in danger of snow-slides. The two cases are parallel. In each case the plaintiff is in "*a place of danger;*" in each case the defendant (as a sane person) necessarily knows of the danger; in each case the plaintiff may have used due care; and in each case the plaintiff may have been injured by *vis major* or the act of God, *without any misrepresentation, deceit or other fault whatever on the part of the defendant.*"

Further, the instruction requested and refused would not have confined the jury to the consideration of only such danger as was proximate, but would have permitted or required them to consider any danger, proximate or remote, real or speculative. The rule is *proxima causa non remota spectatur.* In the most extreme view of the case, and even if the defendant had been (as it was not) the employer of the plaintiff, it would have been bound to give notice or warning of only such dangers as appeared to be proximate, such dangers as *were likely to result in the injury complained of.* It would not, even as employer, have been bound to give notice of such dangers from the forces of nature as a reasonable man acting under all the circumstances would not think proximate, and likely to result in the injury complained of. If the defendant did not neglect to take such precautions as a reasonable man acting under all the circumstances would have taken, then it cannot be held liable even on the theory that it was an employer.

The instruction requested does not state the case correctly, because it was too broad. The question of liability is therein put upon whether the house was

"in *a place of danger* from snow slides," and whether the defendant was aware of that fact. What then was implied, or should be understood, in the words "place of danger"? Was it great or small, imminent or remote? Might a person incur such danger and not be considered negligent, or would it be negligent to do so? A "place of danger" from snow slides may, in a country where snow slides occur, mean anything, from the least to the greatest; it may include danger so great that none but the reckless or foolhardy would seek it, and it may include danger so remote as to be speculative only, and between these may be all grades of danger. Now, what kind of danger—how great or how little—was to be implied in the language used? Was a danger of snow slides, which was so remote that evidence afforded by the rocks and trees showed that a snow slide had not occurred for two hundred years in that place, such a danger as to require the defendant to warn the plaintiff? Was a danger, not apparent even to those familiar with snow slides "without an examination of the mountains far above the house," such a danger as to require the defendant to discern it and apprehend injury as likely to result to the house therefrom? Certainly not; and we repeat that the danger, and the only danger that defendant, even it were an employer, was bound to discover and warn the plaintiff of, was such a danger as a man of ordinary prudence, under like circumstances, would have discovered and anticipated—not the unexpected, the unlooked for, the infinitesimal and speculative danger that may come to anybody and everybody in any walk of life.

See, further, on this point the rule as to what constitutes due care, stated by Mr. Justice HARLAN in *Wabash*

Ry. Co. vs. McDaniels, 107 U. S., 454, 461, quoted *infra*, Point IV.

For these reasons, the instruction requested by plaintiff was rightly refused.

IV.

There was no reversible error in the instructions which were given.

(1) THE EXCEPTIONS TO THE INSTRUCTIONS ARE TOO VAGUE AND INDEFINITE TO BE CONSIDERED BY THIS COURT.

The exceptions which plaintiff's attorney took to the instructions given by the Court did not point out specifically any alleged error of law therein stated. They were wholesale exceptions. The whole charge to the jury is set forth at length in the bills of exceptions, and the exceptions are general to the whole charge. It is true plaintiff's attorney did not wait until the end of the whole charge and then make one single statement that he excepted to the charge, but he did what was equivalent. From time to time during the progress of the charge, a general exception was stated, and appears in the record in this form: "And to the giving of which instructions" (sometimes "instruction") "the plaintiff by her counsel, then and there excepted." No objection to the instructions or any one of them was pointed out, and no request was made to correct them or any

one of them. The exceptions stand, therefore, precisely as they would have stood if there had been but one single exception at the end of the charge, and that one a general exception to the whole charge. The function of an exception is to bring before the appellate court, for correction, a ruling of the court below upon a proposition of law; and the exception should be so taken as to show what proposition of law plaintiff in error deemed erroneous, and what he excepted to, in order that the trial Court may then and there have an opportunity of correcting it if erroneous, and in order that the appellate court may see if error was committed. The exceptions taken in the present case were just as ineffectual for this purpose as if there had been but one general exception to the entire charge.

This Court has many times refused to hear such exceptions, and has treated general exceptions to parts of the charge, precisely as it treats a general exception to the whole charge, as ineffectual to raise a question of error in this Court. A few of the authorities are given below. We may add, before proceeding to these authorities, that the assignments of errors are equally as vague and indefinite as the exceptions (Records, Case, No. 100, pp. 39–42; Case, No. 101, pp. 19–22).

In *Beckwith vs. Bean*, 98 U. S., 266, Mr. Justice HARLAN said (p. 284):

"The exceptions to the charge as given are too vague and indefinite to raise the questions which were claimed in argument to arise under the Acts of 1863 and 1867 (*Lincoln vs. Claflin*, 7 Wall., 132; *McNitt vs. Turner*, 16 *Id.*, 362; *Beaver vs. Taylor et al.*, 93 U. S., 46). *The exception is scarcely more definite than a general exception to the whole charge would have been.* We cannot tell what specific portions of the elaborate charge concerning the evidence relied upon for justifica-

tion under those acts were intended to be covered by this general exception. The exception was to a series of propositions in gross, relating to the construction and to the validity, in certain aspects, of these Acts of Congress, and to a mass of evidence introduced for the purpose of establishing the defence allowed by those acts. Some of those propositions seem to be sound in any view of the case; *but, since the exception did not call the attention of the Court below to the specific propositions which were objected to, it cannot be regarded here.* For the same reasons, we cannot consider the alleged error of the Court in its charge to the jury upon the question of vindictive damages."

Note that the exceptions in that case were to separate charges, but were not considered by this Court because they were general and did not specify any particular error of law.

So, also, the exceptions in *Railroad Company vs. Varnell*, 98 U. S., 479, were like the exceptions in the present case; and this Court refused to consider them. Mr. Justice CLIFFORD said (pp. 484-5):

"At the close of the Judge's remarks upon that subject is another exception, in the words following: 'To which instruction the counsel for the defendant then and there excepted.' Discussion of *that exception* may well be omitted, as the remarks made in respect to the *preceding exception* are believed to be sufficient to show that it is not sufficiently explicit, and that it must be overruled.

"Expert witnesses were called and examined in the case, and the *third exception* has respect to the remarks of the Judge upon that subject.

"Neither the exception nor the assignment of error designates any particular remark of the Judge as erroneous; and, in view of the fact that the exception is addressed to the entire remarks as an instruction, the Court is of opinion that it requires no further examination.

* * * * * *

"Where the charge of the Judge to the jury is of a character to mislead the jury, the error is one of law and may be corrected in an appellate court; *but, in every such case, the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that be done, the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law.*"

Note that in that case, also, there were separate instructions separately excepted to; but the exceptions were general, and therefore were not considered by this Court.

So, also, in *Unitarian Society vs. Faulkner*, 91 U. S., 415, the Court say (p. 423):

"Two or three passages of the charge, it must be admitted, are quite indefinite and somewhat obscure; but they are not more so than the exceptions of the defendants, which are addressed to nearly a page of the remarks of the Judge, without any attempt to specify any particular paragraph or passage as the subject of complaint; nor does the assignment of errors have much tendency to remove the ambiguity.

"Instructions given by the Court to the jury are entitled to a reasonable interpretation; and they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party. *Castle vs. Bullard*, 23 How., 189.

"Even now, though the complaining party has filed an assignment of errors and submitted a written argument, it is by no means certain what the precise complaint is, unless it be that the verdict, in their view, is for the wrong party."

In *Spring Co. vs. Edgar*, 99 U. S., 645, the Court say (p. 658):

"Exception was taken to that remark without request for a different instruction, or that it should be qualified or explained in any way."

* * * * * *

"Instructions given by the Court at the trial are entitled to a reasonable interpretation, and if the proposition as stated is not erroneous, *they are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies not pointed out by the excepting party. Castle vs. Bullard*, 23 How., 172.

"Appellate Courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the matter explained. *Locke vs. United States*, 2 Cliff. 574; *Smith vs. Mc Namara*, 4 Lans. (N. Y.), 169.

"Requests for such a purpose may be made at the close of the charge, to call the attention of the Judge to the supposed error, inaccuracy, or ambiguity of expression; and where nothing of the kind is done, the judgment will not be reversed, unless the Court is of the opinion that the jury were misled or wrongly directed. *Carver vs. Jackson, ex dem. Astor et al.*, 4 Pet., 1; *White vs. McLean*, 57 N. Y., 670.

"None of the exceptions can be sustained, and there is no error in the record."

For these reasons, therefore, the exceptions to the instructions which were given were insufficient and should not be considered by this Court.

(2) BUT EVEN IF THESE INSTRUCTIONS BE CONSIDERED UPON THEIR MERITS, THERE WAS NO REVERSIBLE ERROR IN THEM.

We have shown above (Point III.) that the instruction requested by plaintiff was rightly refused; also (Point IV. [1]), that the exceptions to the instructions are too vague and indefinite to be considered by this Court. We proceed now to show, briefly, that even if the exceptions to the instructions given can be considered by this Court, these instructions were, at least, as much as plaintiff was entitled to have given.

We maintain, *first, that upon the evidence the defendant was entitled to a direction of a verdict in its favor;* because the relation between the parties was that of landlord and tenant (Point I., *supra*); because there was *no evidence* tending to prove any fraud, misrepresentation or deceit on the part of the landlord as to the condition of the premises, much less as to the outside forces of nature (about which, indeed, fraud or deceit was utterly improbable, if not impossible); and because in the absence of fraud, misrepresentation or deceit on the part of the landlord, he is not liable for any injury that may happen to the tenant (or those who occupy under him) caused by the defective or unsafe condition of the premises, much less for an accident caused by *vis major* or the act of God (Point II., *supra*). Inasmuch, therefore, as defendant was entitled to have a verdict directed in its favor, the plaintiff was not harmed by any instructions which were given, and cannot now complain that such instructions were erroneous.

Barth vs. Clise, 12 Wall., 400.
Evans vs. Pike, 118 U. S., 241.
Deery vs. Cray, 10 Wall., 263.

SECOND. But, further, even if the plaintiff was entitled to have the cases submitted to the jury, still the instructions were as favorable as plaintiff was entitled to.

(a) If we assume (as was the fact) *that the relation between the defendant and plaintiff was that of landlord and tenant,* then the instruction which stated when and under what circumstances the landlord is bound to notify the intending tenant of a defect or danger in the premises correctly states the law (or at least does not state it incorrectly to the prejudice of plaintiff), as is

abundantly shown by the authorities quoted in this brief, *supra*, Point II. The instruction on this point was as follows (Records, Case No. 100, p. 36; Case No. 101, pp. 15, 16):

"* * * The position of the parties was in general that of landlord and tenant. * * *

"The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principles applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented, and which were subject to a contagious disease, as where a prior tenant had occupied such a house having contagious disease, and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it was given, but I believe I have seen it—in which a house was immediately above an excavation which had been made below for a mine, and a caving occurred, and the house fell into the excavation, the tenant going there without knowledge of the defect existing underground, if the landlord had knowledge and concealed the fact from him he may be liable to an action in respect to a matter of that kind. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant, and not otherwise, unless there is some wrongdoing—some omission of duty—on the part of the landlord towards his tenant. There is no right of action, and if the defect be one which is as apparent to the tenant as to the landlord, open to the observation of all, then there is no right of action."

(b) But even if we assume (what was not the fact) *that the relation between defendant and plaintiff was*

that of employer and employee, then, as we have stated above, if the defendant did not neglect to take such precautions as a reasonable and prudent man, acting under all the circumstances, would have taken, it cannot be held liable, even on the theory that the defendant was plaintiff's employer, while, as we have seen above, the defendant was not the employer of plaintiff, but her landlord, and its liability as landlord is not greater but less than that of an employer.

It is hardly necessary to refer to any authority for this well-known rule as to what constitutes due care on the part of an employer; but if any authority is needed, see the statement of this rule made by Mr. Justice HARLAN in *Wabash Ry. Co. vs. McDaniels*, 107 U. S., 454, 461:

"Ordinary care, then, and the jury were, in effect, so informed, implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employee, *such watchfulness, caution and foresight as, under all the circumstances of a particular service, a corporation controlled by careful, prudent officers ought to exercise.*"

The following instructions given by the Court fully and fairly presented the question of fact of defendant's alleged negligence, or due care, to the jury upon the evidence, and they, by their verdict, found that defendant was not negligent (Records, Case No. 100, pp. 36–38; Case No. 101, pp. 16–18):

"Now, to apply this rule to the cases of this kind there can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous, and where it was very difficult to build a road or operate it when built—as the scheme itself was one which was lawful, which the company could properly engage in, just as men

may carry on mining wherever they can find mines—*that they were only under one obligation, and that was to use due care in respect to the location of any building which they might require,* and, *having used such care with reference to the property of the company,* there can be no liability to any one for anything that may result thereafter."

"They are not responsible for the condition of the country as that it was subject to snow-slides. They were not bound to desist from the building of the railroad or from putting up a section house because it was subject to snow-slides. They could do these things without liability to any one *if they were done in a careful and prudent manner.*"

* * * * * *

"So with the railroad company in going over this mountain; it was a lawful enterprise to go over it and build their road if they thought proper to do so. If a section house was needed there, all that was required of them was to put it in the place which seemed to be the best, which, *in the exercise of ordinary care and prudence,* seemed to be the best suited for the work.

"Now, *the question is whether this was done or whether there was anything in the circumstances which, if it was done in the first instance, whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place* AND MAINTAINING IT THERE, then there can be no liability, however unfortunate the plaintiff may have been, in being there at the time of this snow-slide."

* * * * * *

"NOW, GENTLEMEN, *if upon that you think this company was guilty of negligence in putting the section in this place and maintaining it there,* the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to be submitted to the jury at all; *but I have decided, for the present at least, to submit it to your judgment,* since it may be more desirable that it should be determined by business men than by any officer of the Court; *so it is submitted for your consideration with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through*

which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that *using care and prudence in that regard*, with a *view to the dangers to which they were exposed*, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use."

We submit with perfect confidence that these and the other instructions given by the Court were all, and more than all, that plaintiff was entitled to. If the verdict had been the other way, *we* might probably complain of these instructions; but certainly the plaintiff cannot. They state correctly the landlord's liability to give notice of defects or dangers, to wit, that he is only bound to do so in the case of *secret* defects or dangers, and not those which are open and patent; and they state correctly the rule which would prevail in the case of employer and employee, that the employee is bound only to exercise such care as a reasonable and prudent man would exercise under all the circumstances. More than this, plaintiff was not entitled to. There was, therefore, no error, and the judgment should be affirmed.

Any expressions of opinion by the Judge at the trial were allowable, since no rule of law was stated incorrectly by him (at least none to the prejudice of the plaintiff), and the matters of fact were ultimately submitted to the jury for their determination. This is well established law in the Federal Courts.

"And if they (certain remarks of the Judge) can be construed as expressing an opinion upon the facts, the expression of such an opinion is within the discretion of the Judge presiding at a trial by jury in any court of the United States, and when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error" (citing cases).

B. & P. R. R. Co. vs. Baptist Church, 137 U. S., 568, 574.

In another case Mr. Justice GRAY said:

"The only other exception argued is to the statement made by the Judge to the second jury, in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But, at the outset of his charge, he had told them, in so many words, that the facts were to be decided by the jury and not by the Court. And it is so well settled, by a long series of decisions of this Court, that the jury presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to three recent cases in which the Judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar" (citing cases).

Simmons vs. United States, 142 U. S., 148, 155.

In conclusion, we submit that, unfortunate as this accident was, *it was clearly but an accident*, and came unaided by the hand of man, and was of a kind that the hand of man was powerless to resist. It came about from natural causes, unexpected, and before unheard of in their severity and extent, and the result overthrew all the calculations of prudence and sagacity of those who

were affected by them, and swept away in an instant the timber growth of many years and the habitations of men who had sought the situation only because of its apparent safety. The case was fully submitted to the jury, who, being men acquainted with the country and many of them from beneath the shadows of the mountains down whose sides the snow-slides sweep, were familiar with like scenes and could best judge of any question of negligence involved in the case. They heard the evidence, looked upon photographs (not introduced in the bill of exceptions), and found that there was no negligence on the part of the defendant, and no cause of action; and hence, from the well-known and everywhere recognized tendency of all juries to find against railroad corporations in all possible cases, it seems clear that the defendant's case was a strong and clear one. In such a case, on such evidence, and with instructions to the jury which were more than fair to the plaintiff, we respectfully submit that the verdict ought not to be disturbed.

V.

The judgments in both cases should be affirmed with costs.

JOHN F. DILLON,
HARRY HUBBARD,
For the Defendant in Error in both cases.

Nov. 14, '92—50.

[4058]